STATE OF MICHIGAN

COURT OF APPEALS

OAKLAND UNIVERSITY CHAPTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,	UNPUBLISHED February 9, 2012
Charging Party-Appellee,	
v	No. 300680 MERC
OAKLAND UNIVERSITY,	LC No. C08 K-241
Respondent-Appellant.	

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Oakland University (respondent) appeals as of right from the decision of the Michigan Employment Relations Commission (MERC) granting summary disposition in favor of Oakland University Chapter, American Association of University Professors (the union). The MERC concluded that respondent had unilaterally repudiated a binding settlement between the parties and committed an unfair labor practice in violation of the Public Employment Relations Act (PERA), MCL 423.210 *et seq*. We affirm.

I. FACTS AND PROCEDURAL HISTORY

In 1998, the union filed a grievance against respondent. In 1999, the union and respondent voluntarily entered into a settlement in which respondent agreed that if the union alleged a violation of the Article XXVIII "Past Practices" section of the collective bargaining agreement or other constitutional processes referenced in that section in the future, respondent would not assert the jurisdictional defense that the issue is "a governance matter, not a contract issue." The settlement was signed by respondent's president and vice provost.

In 2008, respondent divided a department into two separate departments at the request of department faculty. The union filed a grievance, alleging that respondent violated Article XXVIII of the parties' collective bargaining agreement by failing to solicit advice according to university constitutional processes. Respondent responded to the union's grievance in part by stating that "[i]f the Dean of the college violated the College's constitutional processes as alleged, it is a matter to be taken up and resolved within the channels of shared governance . . . ." The union then alleged that respondent's statements were in violation of the 1999 settlement.

The hearing referee based his recommendation on facts and exhibits stipulated to by both parties. The referee indicated that the parties had voluntarily entered into a settlement in 1999; that the settlement provided an authoritative interpretation of Article XXVIII of the collective bargaining agreement and that respondent expressly waived "the future assertion of a position contrary to the terms of the settlement;" and that respondent had, in response to the union's 2008 grievance, reasserted the position it had previously agreed to waive. The referee found that the parties intended the settlement to interpret provisions of the collective bargaining agreement and that, therefore, the settlement did not require ratification by respondent's Board. The referee indicated that respondent's president and vice provost had apparent authority to bind respondent to the settlement and that the unilateral repudiation of the grievance settlement was unlawful and an unfair labor practice in violation of the PERA. In adopting the referee's recommendations, the MERC noted that "[f]or the stability of labor relations, a party must be able to rely on the apparent authority of those representatives entering into settlement agreements on behalf of their principal." The MERC concluded that respondent violated the PERA by repudiating a binding settlement.

II. STANDARD OF REVIEW

The MERC's findings of fact are conclusive if they are "supported by competent, material, and substantial evidence on the record." MCL 423.216(e). This Court accords deference to the MERC's factual findings due to the MERC's expertise in the area of labor relations. *St Clair Intermediate School Dist v Intermediate Ed Ass'n*, 458 Mich 540, 553; 581 NW2d 707 (1998). This Court will not overturn the MERC's conclusions of law unless they violate a constitutional or statutory provision or are otherwise "based on a substantial and material error of the law." See MCL 24.306(1)(a) and (f). This Court errs if it fails to give deference to the MERC's expertise and longstanding practices regarding public policy. *Grandville Mun Exec Ass'n v City of Grandville*, 453 Mich 428, 437-438; 553 NW2d 917 (1996).

III. ANALYSIS

Respondent asserts six points of error that are encompassed by the following four arguments:[1] (1) the doctrine of repudiation should not be applied to a grievance settlement; (2) because the settlement prevents respondent from asserting a jurisdictional defense, it effectively modified the parties' collective bargaining agreement without Board approval and impermissibly interferes with respondent's constitutional autonomy; (3) the doctrine of apparent authority

[1] Respondent also briefly argues that a separate "zipper clause" of the parties' collective bargaining agreement should prevent plaintiff from enforcing the settlement when it has not been incorporated into the subsequent collective bargaining agreements reached by the parties. Respondent fails to cite any authority for this proposition. "[A] mere statement without authority is insufficient to bring an issue before this Court" and it is not up to this Court to rationalize a basis for respondent's claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); MCR 7.212(C)(7). We deem this issue abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

should not have been applied to the settlement and it should be deemed unenforceable by the statute of frauds; and (4) respondent did not commit an unfair labor practice because there was a bona fide dispute over the interpretation of the settlement and the alleged repudiation did not have a significant impact on the bargaining unit.

A. THE MERC DID NOT ERR IN APPLYING THE DOCTRINE OF REPUDIATION TO A GRIEVANCE SETTLEMENT

Respondent argues that the doctrine of repudiation cannot be applied to a settlement alone, and that in order for the union to be allowed to enforce the terms of a settlement, that settlement must be deemed to have modified the parties' collective bargaining agreement. We disagree.

Generally, a party is not allowed to unilaterally modify an existing contract. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372-373; 666 NW2d 251 (2003). A valid settlement is as binding as any other contract between the parties. *Van Wagoner v Van Wagoner*, 131 Mich App 204, 211; 346 NW2d 77 (1983). In this case, the MERC concluded that respondent had erred in attempting to unilaterally repudiate the settlement. Respondent has not shown that the MERC's decision was affected by a substantial and material error of law.

Indeed, the MERC has repeatedly found that the repudiation of a settlement is an unfair labor practice. The repudiation of a settlement formed the basis of an unfair labor practice in *Eaton Co Bd of Comm'rs v Capitol City Lodge No. 141 of the Fraternal Order of Police*, 17 MPER 82 (2004). In that case, the MERC concluded that the respondent's continued use of a sheriff department's chief deputy as a representative was an unfair labor practice when the parties had expressly agreed in a previous settlement that the chief deputy would not be used. *Id*. The referee[2] noted that the MERC defines repudiation as "an attempt to rewrite a contract, a refusal to acknowledge its existence, or a complete disregard for the contract as written." *Id*. The referee ordered the respondent to "[c]ease and desist from repudiating the December 13, 2001 settlement agreement . . . ." *Id*.

In *City of Roseville*, 23 MPER 55 (2010), the MERC concluded that a settlement does not need to be incorporated into the parties' collective bargaining agreement to form the basis of a repudiation claim. In *City of Roseville*, the parties entered into a settlement that was never incorporated into the parties' subsequent collective bargaining agreements. *Id*. The MERC concluded that the respondent committed an unfair labor practice when it subsequently attempted to unilaterally repudiate the settlement, reasoning that "compromises that result in agreement provide stability to the parties' relationship and a degree of reliability to future interactions . . . . If settlements can be unilaterally revoked, both stability and the possibility of productive future discussions are undermined." *Id*. (internal citation and quotation marks omitted). This reasoning is in accordance with MCL 423.1, which states that "the public policy of this state is that the best interests of the people of this state are served by the prevention or prompt settlement of labor disputes."

[2] The referee's decision was adopted by the MERC.

Respondent has not demonstrated that the MERC's decision in the present case was based on a substantial and material error of law. Indeed, the MERC's application of the theory of repudiation to the settlement in this case is supported by the MERC's public policy practices. We conclude that the MERC did not err in applying the doctrine of repudiation to the parties' grievance settlement.

B. THE SETTLEMENT DID NOT AMEND THE PARTIES' COLLECTIVE BARGAINING AGREEMENT AND DOES NOT INTERFERE WITH RESPONDENT'S AUTONOMY

Respondent argues that the settlement simply "did not interpret any contract language" and thus was not a mere interpretation as opposed to an amendment. Respondent further argues that the settlement impermissibly erases the constitutionally recognized separation between academic governance and collective bargaining. We disagree.

Respondent's argument that the settlement was not an interpretation is refuted by the MERC's contrary factual finding. The MERC adopted the referee's factual finding that "[i]n that settlement agreement . . . the parties sought to and did provide an authoritative *interpretation* of a particular contract section, with the express agreement that *such interpretation would prevail until and unless the contract language was changed*" (emphases added).

The parties had stipulated that the union was not contending that the settlement amended the collective bargaining agreement. In addition, Referee Doyle O'Connor had the contracts before him at the summary disposition hearing when he made his findings of fact. Referee O'Connor based his findings on the language of the contracts before him. The MERC also had the language of the settlement and collective bargaining agreement before it as exhibits attached to the stipulated facts when it adopted referee O'Connor's factual findings. The various documents adequately supported the MERC's decision. The issue regarding whether the parties intended the settlement to amend or modify the collective bargaining agreement involved a finding of fact, and the MERC's findings of fact should not be overturned where they are supported by competent, material, and substantial evidence on the record. Thus, we will not overturn the MERC's finding that the parties intended the settlement to *interpret* the collective bargaining agreement, not amend it.[3]

Respondent further argues that the settlement impermissibly interferes with its constitutional autonomy. The only authority respondent cites to support its position is *Regents of University of Michigan v Michigan Employment Relations Commission*, 389 Mich 96; 204

[3] Respondent further argues that respondent's board was required to ratify the settlement. Respondent's argument is premised on the conclusion that the settlement was an amendment to the collective bargaining agreement, rather than an interpretation of it. Respondent admitted at the hearing that its board is not required to ratify a settlement that does not amend the collective bargaining agreement. Because we have determined that the settlement did not amend the collective bargaining agreement, respondent's argument fails.

NW2d 218 (1973). In *Regents of Univ of Mich, id*. at 98-99, 103, the Supreme Court considered whether allowing medical interns, residents, and fellows to unionize would violate the Michigan Constitution.[4] After the Court determined that the University of Michigan was a public employer subject to the provisions of the PERA, the Court concluded that merely allowing interns, residents, and fellows to organize did not infringe upon the constitutional autonomy of the Board of Regents. *Id*. at 106-108. However, the Court also recognized that the Board of Regents' "autonomy . . . in the educational sphere [has] been protected by our Court" and that "the scope of bargaining by the Association may be limited if the subject matter clearly falls within the educational sphere." *Id*. at 107, 109. The Court reasoned that the Association would be unable to bargain on certain conditions of employment, such as number of hours to be worked and whether certain types of work would be "distasteful," because requiring the Regents to bargain on these issues would infringe upon the constitutional autonomy of the Regents in the educational sphere. *Id*. at 109-110.

Respondent states that the Michigan Supreme Court in *Regents of Univ of Mich* clearly recognized that the provisions of the PERA could not infringe upon certain constitutionally protected matters of academic governance. However, respondent simply does not explain how respondent's voluntary entry into collective bargaining agreements and a settlement on a permissive subject of bargaining interferes with its autonomy in an impermissible fashion.

The PERA establishes both mandatory and permissive subjects of collective bargaining. MCL 423.213 *et seq*. Whether a subject of bargaining is mandatory or permissive is a distinction that plays a vital role in the collective bargaining process. *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168, 178; 445 NW2d 98 (1989). Public employers have no duty to bargain over permissive subjects of collective bargaining under the PERA. *Metropolitan Council No. 23 v City of Center Line*, 414 Mich 642, 654; 327 NW2d 822 (1982). Mandatory subjects of collective bargaining include "wages, hours, and other terms and conditions of employment" and any matters that have a significant impact on wages, hours, or other terms and conditions of employment as determined on a case-by-case basis. 423.215(1); *Oak Park Pub Safety Officers Ass'n v City of Oak Park*, 277 Mich App 317, 325; 745 NW2d 527 (2007). Any subjects that are not "mandatory" subjects of collective bargaining are "permissive" subjects of collective bargaining. *Southfield Police Officers Ass'n*, 433 Mich at 178.

Paragraphs 192 and 193 of the parties' collective bargaining agreement dated 2006-2009 read:

[4] Const 1963, art 8, § 6 states that "[o]ther institutions of higher education established by law having authority to grant baccalaureate degrees shall each be governed by a board of control which shall be a body corporate. The board shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds."

ARTICLE XXVIII

PAST PRACTICES

192. **Educational Policy**. The enumeration of faculty members' rights, responsibilities, and privileges in this Agreement shall not be construed to deny or diminish existing rights, privileges, and responsibilities of faculty members to participate directly in the formation and recommendation of educational policy within the University and schools, college, Library or Eye Research Institute, as these rights, privileges, and responsibilities are described under the appropriate constitutional processes of the schools, college, Library or Eye Research Institute and the University. Such participation shall be accomplished through the traditional procedures, policies, and practices of the University Senate, schools, college, Library or Eye Research Institute. Changes or modifications in such procedures shall be governed by the procedures established in such processes.

193. Existing procedures, policies, and practices of faculty members and Oakland as outlined by the constitutions of the University Senate and the several schools and colleges and as established by Oakland shall be continued.

The settlement reads, in pertinent part:

6. Oakland agrees, that in future matters (until if and when the applicable provisions are amended by the parties), if the Association alleges a violation of Article XXVIII of the collective bargaining agreement, and the parties cannot resolve the matter to their mutual satisfaction, and the Association files a grievance based upon an assertion that this article was violated because Oakland did not comply with a provision of the Constitution of the College of Arts and Sciences, or the Constitution of the Oakland University Senate, or other "constitutional processes" referenced in Article XXVIII, then Oakland will not assert as a jurisdictional defense that this "is a governance matter, not a contract issue." This commitment in no way diminishes Oakland's rights to assert any defense on the merits of a dispute that the provisions of Article XXVIII were not in fact violated.

Article XXVIII of the parties' collective bargaining agreement preserves the rights of faculty members to participate in academic governance through traditional procedures, policies, and practices of the university. Because this provision does not involve wages, hours, or other terms and conditions of employment, and does not appear to have any significant impact on wages, hours, or other terms and conditions of employment, it does not involve a mandatory subject of collective bargaining under the PERA. Therefore, this provision involves a permissive subject of collective bargaining on which respondent had no duty to bargain. Because respondent chose to bargain on this issue and chose to interpret the provision through the settlement, it would be illogical to say that enforcing the settlement would impermissibly interfere with the separation of academic governance and collective bargaining.

C. THE MERC CORRECTLY APPLIED CONCEPTS OF APPARENT AUTHORITY TO THE PARTIES' SETTLEMENT

Respondent argues that the MERC improperly applied the concept of apparent authority to the settlement because the union was obligated to determine whether respondent's representatives had the power to sign the settlement, because respondent acted outside of its statutory authority in delegating the power to sign the settlement, and because the union should have expected the settlement would need to be ratified by respondent's board. Respondent argues that because no one with authority signed the settlement, the statute of frauds prevents the settlement's enforcement. We disagree.

It is unlawful for "a labor organization or its agents (a) to restrain or coerce: . . . (ii) a public employer in the selection of its representatives for the purposes of . . . the adjustment of grievances . . . ." MCL 423.210(3). The MERC noted that in the present situation, MCL 423.210 meant that the union was obligated to conclude that the representatives respondent sent to the negotiations had the authority to settle routine grievances. This Court finds the MERC's reasoning compelling. It would be illogical to require the union to question the authority of respondent's agents when the union is essentially prevented by statute from doing so.

Second, respondent did not act outside of its statutory authority in allowing its president and vice provost to sign the settlement. The statute that empowers respondent does not provide that its power to contract is exclusive or non-delegable. MCL 390.154. Respondent has extensively delegated its contracting power in its Contracting and Employment Appointment Authority policy. Respondent's president and various vice presidents are among those to whom respondent has delegated its contracting power, including the power to sign collective bargaining contracts.[5]

Finally, respondent's argument that the union should have expected that the settlement would need to be ratified is unpersuasive. Generally, a party cannot render a settlement ineffective by alleging its own failures. *City of Detroit (Fire Dep't)*, 18 MPER 39 (2005); see also, generally, *Genesee Foods Serv v Meadowbrook, Inc*, 279 Mich App 649, 660; 760 NW2d 259 (2008) (unilateral mistake by a party is an insufficient basis to modify a settlement). In *City of Detroit (Fire Dep't)*, 18 MPER 39, the MERC stated that if one party were allowed to argue its own error in order to repudiate an agreement, "there would appear to be no limit to the ability of one party, through its agents or officers, to assert their own wrongdoing to vitiate an agreement." *Id*. The MERC stated that a party commits an unfair labor practice by repudiating an agreement based on alleged misunderstandings of only the one party. *Id*.

Here, respondent's president signed the settlement. Respondent's president is extensively mentioned in respondent's own policies as a person to whom contracting authority has been

[5] Respondent cites several employment cases in which the plaintiffs were unable to recover against public institutions. The cases respondent cites are simply not analogous to this case, because in those cases the respondents were statutorily prohibited from delegating the power to sign the employment contracts under which the plaintiffs were seeking to recover.

delegated, including in the area of collective bargaining agreements. Respondent did not advise the union that any further approval or action would be necessary to effectuate the terms of the settlement.[6] This Court concludes that the MERC did not commit a substantial and material error of law when applying the doctrine of apparent authority in this case, where respondent is attempting to assert its own error to vitiate a settlement agreement that was entered into by an agent of respondent whom respondent sent to the settlement proceedings. Respondent's statute of frauds argument additionally fails because the settlement was in fact signed by an agent with apparent authority.

D. RESPONDENT COMMITTED AN UNFAIR LABOR PRACTICE

Respondent argues that it did not commit an unfair labor practice because there was a bona fide dispute over the interpretation of the settlement, and because the breach of the contract did not have a substantial impact on the union's bargaining unit. We disagree.

The unilateral modification of a contract can be an unfair labor practice. See *St Clair Intermediate School Dist*, 458 Mich at 568. Once the parties have reached an agreement on a subject, neither party is allowed to unilaterally modify the agreement, even if it only involves a permissive subject of bargaining. *Kalamazoo Co. v Kalamazoo Co. Sheriff's Deputies Ass'n*, 22 MPER 94 (2009); see also *St Clair Intermediate School Dist*, 458 Mich at 571 ("a meeting of the minds [is] necessary to modify the contract after it has been made"). The MERC will conclude that a contract has been repudiated if (1) the contract breach is substantial and has a significant impact on the bargaining unit, and (2) no bona fide dispute over the interpretation of the contract is involved. *City of Roseville*, 23 MPER 55.

We disagree with respondent's arguments that the breach of the contract in this case was insignificant and was not supported by the record.[7] Respondent argues that the doctrine of repudiation requires a continuing impact that is not isolated. Respondent fails to cite any authority for this proposition. It is not up to this Court to rationalize a basis for respondent's claim. *Wilson*, 457 Mich at 243; MCR 7.212(C)(7). More importantly, respondent's assertion is contrary to the authority that exists on this issue.

Whether there has been a significant impact on the bargaining unit is an inquiry that focuses on the breach of the contract. *City of Roseville*, 23 MPER 55. A respondent's repudiation can have a significant impact on the bargaining unit if the respondent does exactly what the respondent agreed not to do in a prior settlement. *Eaton Co Bd of Comm'rs*, 17 MPER 82. The MERC reasoned, in *Eaton Co Bd of Comm'ers*, that such circumstances had a

[6] The referee noted that the settlement itself "does not have language, which is not uncommon, that indicates that it's effective only upon ratification by one side or both sides."

[7] To the extent respondent's argument relies on the subsequent arbitration between the parties, respondent's references are outside the record in this appeal. This Court's review is limited to the record of the administrative tribunal, and we will not allow enlargement of the record on appeal. *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).

significant impact on the bargaining unit because the settlement was reached after the union had agreed, as consideration, to withdraw a prior grievance. *Id*.

The MERC's approach in *Eaton Co Bd of Comm'rs* is consistent with the PERA's statement of public policy[8] and with statements of the Michigan Supreme Court, which has indicated that decisions that would "discourage clarity in bargained terms, destabilize union-management relations, and undermine the employers' incentive to commit to clearly delineated obligations" work to undermine the goals of the PERA. *St Clair Intermediate School Dist*, 458 Mich at 571 (internal citation and quotation marks omitted).

Respondent has not shown that the MERC's decision in the present case was affected by a substantial and material error of law. Indeed, the MERC concluded that respondent's actions had a significant impact on the bargaining unit because the action went to the core of the parties' previous agreement. The MERC agreed with the following reasoning of the referee:

> "The suggestion that the issue in dispute was not of great significance to the unit simply, and boldly, ignores that the issue of compliance with the University constitutional processes was seen by both parties as sufficiently significant to craft language in the collective bargaining agreement protecting their respective rights and to also enter into a high-level settlement agreement further interpreting that contract language."

The union withdrew a pending grievance in consideration for a settlement. In that settlement, respondent agreed that in situations involving a violation of Article XXVIII of the parties' collective bargaining agreement, respondent would not assert the specific jurisdictional defense that the matter was "a governance matter, not a contract issue." The union subsequently asserted a violation of Article XXVIII of the parties' collective bargaining agreement. Respondent responded to the union's grievance in part by stating that "[t]he constitutions of the University Senate and the College . . . have not been incorporated into the [collective bargaining] agreement by reference or otherwise" and "[i]f the Dean of the college violated the College's constitutional processes as alleged, it is a matter to be taken up and resolved within the channels of shared governance . . . ." Respondent attempted to assert the jurisdictional defense it had previously waived in a settlement with the union.

The MERC's findings of fact regarding the substantial-impact issue are supported by the record, and respondent has not shown that the MERC's decision was affected by a substantial and material error of law.

Respondent also argues that there was a bona fide dispute over the interpretation of the settlement. The referee determined that there was no bona fide dispute regarding the settlement's language; the only dispute concerned its enforceability. His finding was consistent with and supported by respondent's counsel's admission on the record:

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[8] "It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes . . . ." MCL 423.1.

> *Referee O'Connor.* . . . the case law focuses on whether there's a bonafide [sic] dispute as to the interpretation of the language. The dispute you raise seems to me to be solely related to the enforceability of the language—not what it meant, but whether it can be relied upon or enforced. Tell me if I've got that right or wrong, or . . .
>
> *Mr. Bernard.* I think that's half of it. I think the other half is whether or not the agreement amended the collective bargaining agreement, whether it was intended to amend or whether it effectively amends the collective bargaining agreement.
>
> *Referee O'Connor.* But again, that doesn't strike as being—as having anything to do with the interpretation of what the language meant, as opposed to whether it's enforceable.
>
> *Mr. Bernard.* I think you're right on that.

A plaintiff may not take a position before this Court that it has conceded before the trial court. *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994). We find that there was no bona fide dispute over the interpretation of the settlement's language when defense counsel admitted on the record that no such dispute existed.

We find no basis on which to reverse the MERC's decision.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter