

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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WAYNE COUNTY,

Respondent-Appellant,

v

AFSCME COUNCIL 25,

Charging Party-Appellee.

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UNPUBLISHED  
February 13, 2014

No. 303672  
MERC  
LC No. 10-000024

Before: GLEICHER, P.J., and RONAYNE KRAUSE and RIORDAN, JJ.

PER CURIAM.

Respondent Wayne County appeals by right the order of the Michigan Employment Relations Commission (MERC), finding that Wayne County's practice of laying off employees for one day a week constituted an unfair labor practice under § 10(1)(e) of the Public Employment Relations Act (PERA), MCL 423.210(1)(e). Wayne County and charging party AFSCME Council 25 (the Union) were in negotiations over their expired collective bargaining agreement (CBA) at the time, and fact-finding had commenced. MERC found that Wayne County's layoff practice violated the CBA's five-day workweek provision and that by imposing it, the County violated its duty to bargain in good faith. Wayne County contends that MERC and the administrative law judge (ALJ) engaged in improper procedures and arrived at an unjustified result. We affirm.

The parties' CBA was originally effective from December 1, 2004, to September 30, 2008. The parties continued to negotiate under the CBA<sup>1</sup> until May 14, 2009, when Wayne County declared an impasse regarding the elimination of a negotiated 2 percent wage adjustment. Nevertheless, the parties agreed to initiate fact-finding.

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<sup>1</sup> While there is no direct evidence in the record in support, the parties are in general agreement that they initially extended the CBA by agreement and then entered into negotiations. We note that at the expiration of the contract, those 'wages, hours, and other terms and conditions of employment' established by the contract which are deemed 'mandatory subjects' of bargaining survive the contract by operation of law during the bargaining process." *Wayne Co Gov't Bar Ass'n v Wayne Co*, 169 Mich App 480, 485-486; 426 NW2d 750 (1988).

On January 22, 2010, Wayne County notified union employees that they would be laid off for the entire day on every Friday or every other Friday, depending on the employee's work group, and that the weekly or biweekly layoffs would continue until further notice. The union filed the instant charge, contending that the layoffs constituted an unfair labor practice. The ALJ issued a show cause order to Wayne County, directing that the County answer a number of specific questions. Wayne County answered those questions and argued that the layoffs were consistent with authority explicitly granted to it under the managerial prerogative paragraph of the CBA. The ALJ disagreed. At 4:00 p.m. on February 18, 2010, the ALJ faxed a decision and recommended order in favor of the union to the parties. That same day, the County filed a motion to disqualify the ALJ. But because the County mailed its motion to an incorrect address, the ALJ received it only after his decision had been released.

Wayne County filed exceptions to the ALJ's decision that mirror those raised on appeal. Wayne County also moved to stay the proceedings pending an outcome of its motion for disqualification. The ALJ responded in writing to the County's disqualification motion but did not formally decide it. MERC subsequently determined that the ALJ had no reason to recuse himself and further found Wayne County's exceptions entirely without merit, adopting the ALJ's proposed order as the Order of the Commission. This appeal followed.

Wayne County's essentially makes three broad arguments: first, that the MERC lacked jurisdiction; second, that the MERC violated required procedures and Wayne County's right to a fair trial; and third, that the MERC's decision is substantively wrong. We disagree with all three contentions.

The MERC's "findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole," and its "legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Grandville Muni Executive Ass'n v City of Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996) (citations omitted). "Substantial evidence" is "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion[.]" which must be "more than a scintilla" but "may be substantially less than a preponderance." *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994) (citations omitted). An agency's action is "not authorized by law if it violated a statute or constitution, exceeded the agency's statutory authority or jurisdiction, materially prejudiced a party as the result of unlawful procedures, or was arbitrary and capricious." *Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 87-88; 832 NW2d 288 (2013). Consequently, our review is not de novo.

Wayne County argues that the instant dispute is merely a matter of contract interpretation and thus falls outside the MERC's jurisdiction. "The MERC does not exercise jurisdiction of breach of contract claims unless the asserted breach of contract constitutes a complete renunciation of the collective bargaining relationship." *Bay City School Dist v Bay City Ed Ass'n, Inc*, 425 Mich 426, 437 n 12; 390 NW2d 159 (1986). Contrary to the County's argument, this is not a breach of contract action. The union charged that the County's unilateral institution of weekly one-day layoffs constituted an unfair labor practice. The MERC possesses exclusive jurisdiction to adjudicate unfair labor practice charges. *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104, 118; 252 NW2d 818 (1977). Accordingly, the MERC

had jurisdiction to consider the union's charge regardless whether it also implicated contractual rights.

The County asserts that the layoffs were consistent with the CBA and thus did not constitute an unfair labor practice. Further, the County insists, layoff decisions do not constitute mandatory subjects of bargaining. Wayne County premises its argument on the second sentence of Paragraph 8.01 of the CBA, which provides in relevant part: “[t]he Employer possesses the exclusive right to manage the affairs of the County, including but not limited to the right to . . . select the manner in which employees shall be reduced in classifications in the interest of layoff[.]” The County contends that this sentence gives it the unfettered and absolute discretion to lay off employees in any manner it chooses. We agree with the MERC's conclusion that the County did not “layoff” employees; it shortened their workweek. While the County's management retained the ability to implement layoffs, it lacked the authority to cut employees' hours in violation of the CBA.

The decision to lay off employees is generally a management prerogative and, indeed, is not a subject of mandatory bargaining. See *Local 1277, Metropolitan Council No 23, AFSCME, AFL-CIO v City of Center Line*, 414 Mich 642, 646; 327 NW2d 822 (1982). The sentence at issue reaffirms that Wayne County enjoys the exclusive right to lay off employees and that Wayne County possesses the general authority to effectuate layoffs. However, Wayne County's decision to label its action a “layoff” does not settle whether the action actually constitutes a layoff.<sup>2</sup>

The parties' contract defines the term “layoff” as “a separation from employment as the result of lack of work or lack of funds.” After consulting the Merriam-Webster Online Dictionary, the MERC concluded that the term “separation from employment” requires the “termination of a contractual relationship[.]” The MERC continued, “Here no true separation from employment ever occurred; there was only a reduction in the working hours of affected employees. The employment of the affected employees did not end, as it would in a separation; they remained employed but for fewer hours per week.” We adopt this reasoning as our own.

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 Highland Park Bd of Ed*, 457 Mich 74, 84; 577 NW2d 79 (2998). By agreeing to the terms of a CBA, Wayne County and the union created a set of enforceable rules. See *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area School Dist*, 452 Mich 309, 319; 550 NW2d 228 (1996). While the parties agreed that “[t]he Employer possesses the exclusive right to manage the affairs of the County, including but not limited to the right to . . . select the manner in which employees shall be reduced in classifications in the interest of layoff,” the parties also agreed that the term “layoff” required “a separation from employment[.]”

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<sup>2</sup> In an anecdote attributed to President Abraham Lincoln, the question is posed: “if you call the tail a leg, how many legs does a sheep have?” The answer, of course, is *four legs*; even if you call the tail a leg, it is still a tail.

Under the CBA, a layoff alters a worker's employment status. By definition, a laid-off employee is separated from employment. No such employment change occurred here. Union employees remained employed by the County but worked four days per week instead of five. This unilateral change in employee hours contravened Article 20.01 of the CBA which unambiguously provides that "[t]he workweek of each employee shall consist of five (5) regularly scheduled, recurring eight (8) hour workdays during the standard workweek." Simply put, the County's interpretation of the management prerogative clause would permit the county to negate the five-day workweek provision of the contract. The MERC found that the County's action effected a unilateral reduction in employee hours and wages, in direct conflict with an explicit definition in the CBA. MERC determined that the CBA precluded the County from reducing the workweek in the guise of a layoff, and we find no legal error in this conclusion.

We also discern no error in the MERC's ruling that the County's layoff actions constituted an unfair labor practice. After a CBA expires, neither party may unilaterally alter union members' employment hours unless the parties have reached a negotiating impasse and no fact-finding has been commenced. *AFSCME Council 25 v Wayne County*, 152 Mich App 87, 94, 97, 98-99; 393 NW2d 889 (1986). Pursuant to MCL 423.215(1), "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining. "Once a specific subject has been classified as a mandatory subject of bargaining, the parties are required to bargain concerning the subject, and neither party may take unilateral action on the subject absent an impasse in negotiations." *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 277; 273 NW2d 21 (1978) (citations omitted). "An employer who takes unilateral action on a mandatory subject of bargaining prior to impasse in negotiations commits an unfair labor practice." *Wayne Co Govt Bar Ass'n v Wayne Co*, 169 Mich App 480, 486; 426 NW2d 750 (1988). The County's decision to cut-back the workday implicated a core topic of collective bargaining. We are not persuaded that the MERC committed an error of law in finding that the County committed an unfair labor practice by eliminating Fridays as a day of work for union members.

We next turn to Wayne County's procedural arguments, none of which are availing. The County first complains that the ALJ failed to decide the County's motion for disqualification. We have found no rule governing disqualification of administrative law judges in the applicable part of the Michigan Administrative Code. See Mich Admin Code, R 423.101 *et seq.* Furthermore, disqualification is not mentioned in the Administrative Procedures Act, MCL 24.201 *et seq* anywhere other than in MCL 24.279. With no other guidance, we presume the Court Rule governing disqualification of judges and justices, MCR 2.003, applies to administrative law judges as well. Consequently, "all motions for disqualification must be filed within 14 days of the discovery of the grounds for disqualification." MCR 2.003(D)(1)(a).

According to the affidavit of Timothy Taylor, attached to the County's motion to disqualify, the ALJ made an allegedly biased comment to the press on February 4, 2010, and had worked as a union advocate for a number of years prior to becoming an ALJ. While Wayne County presumably was previously aware of the ALJ's past, his alleged statement to the press was made within 14 days of the February 18, 2010 filing of the motion to disqualify, and the motion was filed the day before the ALJ formally issued the decision by placing it in the United States mail. However, there is no dispute—at least, none that Wayne County presents on appeal—that Wayne County sent the motion to an incorrect address. As a consequence of that

misdirection, the ALJ did not receive the motion until *after* the decision had issued. Even if the ALJ technically committed error by failing to rule on the motion prior to issuing his decision, any such error was caused by Wayne County. A party cannot complain of any error that it itself caused. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964).

Moreover, the error was harmless. After examining the evidence, the MERC determined that “it would not have been necessary for the ALJ to recuse himself, even if he had not issued his Decision and Recommended Order before receiving the motion.” As competent, material and substantial record evidence supported this conclusion, we have no basis to disturb it. Wayne County’s argument on appeal in support of a showing of bias is essentially that the ALJ followed improper procedure and reached an incorrect conclusion. None of those assertions, even if true, are enough to establish bias. Adverse rulings, even erroneous adverse rulings, against a party do not establish bias. *In re Contempt of Henry*, 282 Mich App 656, 679-680; 765 NW2d 44 (2009).

The County next asserts that the ALJ and the MERC improperly shifted the burden of proof to obligate Wayne County, the respondent to the charge and the non-moving party on the motion for summary disposition, to disprove AFSCME’s case. Wayne County also contends that it was denied the opportunity for oral argument before the ALJ.

We first address the latter claim. Wayne County correctly points out that “[t]he parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.” MCL 24.272(3). Notably, however, only the *opportunity* to present oral argument is required. *Smith v Lansing School Dist*, 428 Mich 248, 250; 406 NW2d 823 (1987). The MERC’s rules provide that parties must explicitly *request* oral argument. Pursuant to Mich Admin Code, R 423.161(4):

Unless otherwise ordered by the commission or administrative law judge, all motions made before or after hearing shall be ruled upon without notice or oral argument. A request for oral argument may be made by the moving party by separate statement at the end of the motion as filed, or by an opposing party by a separate pleading filed within 10 days after service of the motion, or within any other period as designated by the commission or administrative law judge designated by the commission. If the request is granted, the commission or administrative law judge designated by the commission will serve a notice of hearing upon all parties.

Administrative rules, if properly promulgated, have the force of law. *Danse Corp v City of Madison Heights*, 466 Mich 175, 181; 644 NW2d 721 (2002). Wayne County did not request oral argument. There is no indication that Wayne County was precluded from making a request or that had it done so, oral argument would have been denied. Accordingly we find no merit in Wayne County’s argument that it was improperly denied oral argument.

In support of its burden of proof argument, Wayne County contends that the MERC “failed to conduct a fair and meaningful analysis but instead simply accepted the factual allegations in the Charge as facially proven, despite the fact that the law required MERC to do the exact opposite.” Wayne County correctly points out that Mich Admin Code, R 423.155(1) provides that respondents *may* answer a charge, but “[f]ailure to file an answer shall not

constitute an admission of any fact alleged in the charge, nor shall it constitute a waiver of the right to assert any defense.” Wayne County argues that the ALJ required it to affirmatively prove its own position, in violation of general principles of summary disposition requiring that the moving party to show that the non-moving party’s claim is untenable and that a defense must be impossible to support with any amount of factual development. See *Maiden v Rozwood*, 461 Mich 109, 118-121; 597 NW2d 817 (1999) and *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245-246; 590 NW2d 586 (1998).

Mich Admin Code R 423.165(1) provides: “The commission or administrative law judge designated by the commission may, *on its own motion* or on a motion by any party, order dismissal of a charge or issue a ruling in favor of the charging party. The motion may be made at any time before or during the hearing.” (Emphasis added). Section (3) states in relevant part: “If the motion for summary disposition is filed before the hearing, then the commission or administrative law judge designated by the commission may issue an order to the nonmoving party to show cause why summary disposition should not be granted.” Mich Admin Code R 423.165(3). Clearly, this regulation permitted the ALJ to summarily issue a judgment in favor of the charging party and to issue an order to show cause why the judgment should not be granted. The latter action does not shift the burden of proof. Rather, a show cause order merely advises a party that the other party has apparently satisfied its burden of proof and invites the opposing party to put forth a contradictory view. See *Sault Ste Marie Area Public Schools v Michigan Ed Ass’n*, 213 Mich App 176, 181-182; 539 NW2d 565 (1995).

Here, the essential facts were not disputed: the relevant contractual language, the parties’ respective negotiating postures, and the factual nature of the layoffs were established. Only a legal question remained.<sup>3</sup> And despite Wayne County’s argument to the contrary, we find nothing in the show cause order suggesting that the ALJ had reached a preordained conclusion.

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<sup>3</sup> Although Wayne County did not request oral argument in this Court, counsel was permitted to answer questions and contended that facts are in dispute. We are unable to find any *material* facts in dispute. We presume Wayne County takes exception to the possible implication that it took action for reasons unrelated to the undisputed economic crisis it faced, but MERC recognized that Wayne County’s actions were taken because of its budget crisis.

Wayne County's remaining procedural arguments pertain to the substance of the final decisions reached by the ALJ and by MERC rather than to their *procedural* propriety. For example, Wayne County contends that the ALJ did not address its arguments in the ALJ's final decision. However, it is generally only necessary for a judge to provide a justification for a ruling, not to explicitly refute every possible argument against that ruling. See *Fletcher v Fletcher*, 447 Mich 871, 883-884; 526 NW2d 889 (1994) and *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982). The MERC's decision is supported by substantial evidence and did not contravene the law.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Amy Ronayne Krause