

STATE OF MICHIGAN
COURT OF APPEALS

GRAND RAPIDS FIRE FIGHTERS, LOCAL 366,
INTERNATIONAL ASSOCIATION OF FIRE
FIGHTERS (IAFF),

UNPUBLISHED
September 1, 2000

Charging Party-Appellant,

v

No. 216389
MERC
LC No. C97-C-65

CITY OF GRAND RAPIDS FIRE DEPARTMENT,

Respondent-Appellee.

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Charging party Grand Rapids Fire Fighters, Local 366, International Association of Fire Fighters (IAFF) (the union) appeals as of right from the order of the Michigan Employment Relations Commission (MERC) dismissing the unfair labor practice charge made by the union on behalf of Frank Verburg. We affirm.

On March 14, 1997, the union filed an unfair labor practice charge (ULP) with the MERC on behalf of Verburg, alleging a violation of section 10(1)(c) of the public employment relations act (PERA), MCL 423.210(1)(c); MSA 17.455(10)(1)(c), for failure to promote Verburg to the rank of captain. The charges were as follows:

It is charging party's position that Frank Verburg has not been promoted to the rank of Captain because of his aggressive and provocative advancement of union causes in furtherance of aid to and protection of the union membership. Those lawful activities have generated an animus toward Frank Verburg in those persons responsible for recommending and making promotions, and have resulted in unlawful discrimination against Frank Verburg in the promotional process.

MERC issued a complaint and two hearings were held before hearing referee Nora Lynch on July 9, 1997 and on September 25, 1997. Subsequently, both parties submitted post-hearing briefs to Lynch, who issued a decision and recommended order dismissing the charge on July 14, 1998. Pursuant to MCL 423.216(b); MSA 17.455(16)(b), the union filed exceptions to the recommended

order on August 6, 1998. MERC affirmed the referee's findings of fact and conclusions of law and adopted her decision and recommended order and dismissed the union's charges on November 25, 1998.

The union contends that the referee improperly relied upon the fact that the alleged discriminating parties were members of the same bargaining unit as Verburg. Whether the hearing referee could consider the alleged discriminating parties' membership in Verburg's bargaining unit presents an issue of statutory interpretation, which is an issue of law. See *Regents of the University of Mich v Employment Relations Comm*, 389 Mich 96, 102; 204 NW2d 218 (1973) (courts may review law regardless of findings of commission). We review issues of law de novo. *Mayor of Detroit v Michigan*, 228 Mich App 386, 395; 579 NW2d 378 (1998), vacated in part on other grounds 460 Mich 590 (1999).

MCL 423.216(b); MSA 17.455(16)(b) provides in pertinent part that the commission shall dismiss the complaint if, on a preponderance of the testimony taken, it is not satisfied that the person named in the complaint has engaged in or is engaging in an unfair labor practice. Proceedings under PERA are conducted under MCL 24.271 *et seq.*; MSA 3.560(171) *et seq.* See MCL 423.216(a); MSA 17.455(16)(a). MCL 24.275; MSA 3.560(175), which governs the admission of evidence in contested administrative hearings, provides as follows:

In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

Public employees who would normally be classified as supervisory are not necessarily included in the same bargaining unit as non-supervisory personnel; however, a unique exception to that rule places fire department supervisors and non-supervisors in the same bargaining unit. MCL 423.213; MSA 17.455(13). The union argues that because the referee considered the fact that supervisory and nonsupervisory personnel are members of the same bargaining unit, an unfair, enhanced burden has been placed on non-supervisory employees attempting to show discrimination based on antiunion animus.

The referee relied in part on *County of Tuscola*, 1990 MERC Lab Op 815, in which the commission found no antiunion motivation in a denial of promotion when the parties alleged to have discriminated were members of the same union as the party allegedly discriminated against. The union argues that, by relying on *Tuscola*, the referee in effect raised the standard for proving antiunion animus as evidenced by her statement that it would be "extremely difficult if not impossible" to do. While we

may disagree with the referee that, by considering the membership in the same bargaining unit of Verburg and the parties allegedly engaged in discrimination, it would be “extremely difficult, if not impossible,” to prove discrimination, this does not mean that the common membership cannot be considered as a factor in determining whether respondents violated PERA. There is nothing in the law, beyond the general considerations in MCL 24.275; MSA 3.560(175), that restricts the evidence that MERC may consider when determining whether an unfair labor practice has occurred.

In this case there was testimony taken that the supervisors who participated in the promotional process were part of the same bargaining unit and union as Verburg. This evidence is at least relevant, and certainly, as part of the testimony, within the scope of evidence reviewable by MERC.

In effect, the union argues that MCL 423.213; MSA 17.455(13) is not fair to non-supervisory fire department employees in the context of a MERC ULP review and that the common membership should either not be considered at all, or at least afforded less weight than it was given in the decision by the referee and MERC. As we have noted, the commission must determine whether, on a preponderance of the testimony taken, the person charged has committed an unfair labor practice. Neither MCL 423.216(b); MSA 17.455(16)(b), nor MCL 24.275; MSA 3.560(175) make any distinction as to the weight to be given any piece of evidence, or limit the evidence that may be considered, even in a hearing concerning firefighters. Had the Legislature decided to limit the evidence the commission could consider in proceedings involving firefighters, it could have so provided. MERC properly considered the supervisors’ union membership in assessing the union’s claim of discrimination based on antiunion animus; “reasonably prudent men” would “commonly rel[y] upon” this type of evidence in determining this question. MCL 24.275; MSA 3.560(175).

Next, the union argues that MERC’s decision was not supported by competent, material, and substantial evidence on the record as a whole. We disagree. In *St Clair School Dist v IEA/MEA*, 458 Mich 540, 553; 581 NW2d 707 (1998), our Supreme Court acknowledged MERC’s expertise and judgment in the field of labor relations. The Court has also spoken on the application of the “substantial evidence” standard of review:

Our review of the commission’s decision is circumscribed by the statutory mandate that factual findings of the commission are conclusive if supported by competent, material, and substantial evidence on the record considered as a whole. MCL 423.216(e); MSA 17.455(16)(e), Const 1963, art 6, § 28. Review of factual findings of the commission must be undertaken with sensitivity, and due deference must be accorded to administrative expertise. Reviewing courts should not invade the exclusive fact-finding province of administrative agencies by displacing an agency’s choice between two reasonably differing views of the evidence. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 124; 223 NW2d 283 (1974). [*Amalgamated Transit Union, Local 1564, AFL-CIO v Southeastern Michigan Transportation Authority*, 437 Mich 441, 450; 473 NW2d 249 (1991).]

When reviewing whether an agency's decision was supported by competent, material and substantial evidence on the whole record, a court must review the entire record and not just the portions

that support an agency's findings. *Detroit Symphony Orchestra, supra* at 124. Substantial evidence is “that which a reasonable mind would accept as adequate to support a decision.” *McBride v Pontiac School Dist (On Remand)*, 218 Mich App 113, 123; 553 NW2d 646 (1996). Substantial evidence is more than a mere scintilla but less than a preponderance of the evidence. *In re Payne*, 444 Mich 679, 692 (Boyle, J), 700 (Riley, J); 514 NW2d 121 (1994).

The burden in cases involving claims of antiunion animus is set forth in *MESPA v Ewart Public Schools*, 125 Mich App 71, 74; 336 NW2d 235 (1983), as follows:

[W]here it is alleged that a [management decision] is motivated by antiunion animus the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor in the decision of the employer Once this showing is established, the burden then shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The burden of the employer is one of going forward to meet the prima facie case established by the employee. It is not a burden of persuasion on the ultimate issue of the existence or nonexistence of a violation. It is a balancing of the evidence. If the employer, by credible evidence, balances the employee’s prima facie case, the employer’s burden of proof is met and the duty of producing further evidence shifts back to the employee. The burden of the employer referred to is a burden of production of evidence to meet the prima facie case of the employee. If the burden of the employer is met, the burden is then once again on the employee. [Citing *NLRB v Wright Line, A Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981).]

The commission has articulated with greater specificity the elements that must be proven in order to establish that antiunion animus was a motivating or substantial factor in the challenged action:

The elements of a prima facie case of discrimination under sections 10(1)(c) of PERA include: (1) employee union or other protected concerted activity; (2) employer knowledge of that activity; (3) union animus or hostility to the employee’s protected rights; and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions. Thereafter, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action(s) would have taken place even in the absence of protected conduct. However, the ultimate burden remains with the Union. [*City of Saginaw*, 1997 MERC Lab Op 414.]

At the center of the union’s discrimination charges are several union related activities in which Verburg participated. No one disputes the fact that Verburg was an aggressive and tenacious union president. It is not necessary to revisit the numerous incidents in detail here. It is sufficient to say that the incidents involved strong disagreements between Verburg and the chief and several supervisors who took part in the promotional process on issues ranging from the use of assessment centers in the promotional process and the use of letters of instruction, to the state of disrepair of fire fighting apparatus and unpaid MIOSHA fines. The union alleges that it was these activities, Verburg’s

involvement, and the disagreement that they caused, which led some of Verburg's superiors (the chief in his ultimate hiring decision and the two deputy chiefs, six battalion chiefs, and the training chief who made recommendations to the chief) to deny him a promotion.

According to the union, these incidents created or demonstrated existing antiunion animus that influenced Verburg's superiors during the promotion process. We disagree. There is nothing in the record that connects the disagreements that occurred with the motivation behind the promotional decisions. The union lays out lengthy descriptions of the events, inviting the reader to speculate that such events caused those involved to retaliate against Verburg by failing to recommend him for promotion, or, in the case of the chief, by denying him promotion. However, nothing but pure speculation would lead to that conclusion. Pure speculation, or even substitution of judgment for that of MERC, is improper so long as MERC's decision is based on substantial evidence in the record. See *Detroit Symphony Orchestra, supra* at 124-125.

The union's allegations hinge specifically upon the motivation of fire chief Connors, deputy chief Staal, chief training officer Tibbets, and battalion chiefs Rohloff, Van Dellen, and Hickey. MERC adopted the referee's recommended decision and dismissed the charges, concluding that the union had failed to carry its burden of proving that antiunion animus motivated those involved in the promotional process. In order to reach its conclusion, MERC distinguished between the supervisors' disagreements with Verburg's actions as union president and any opposition there may have been to Verburg's protected concerted union activity in general.

MERC found that although Rohloff and Van Dellen were involved with disputes with Verburg during the period in question, both officers were members of Local 366 and that the disputes were directly related to Verburg's handling of union matters. Specifically, Van Dellen disagreed with the union's lawsuit, which would have nullified promotions, and Rohloff disagreed with the union's opposition to a request by two candidates to relax the service requirements for promotion. Furthermore, tension existed between Rohloff and Verburg after Verburg called Rohloff a profane name in front of other fire fighters; however, Verburg was not disciplined after an investigation concluded that the incident was an internal union matter. MERC concluded that these events constituted disagreements with Verburg's actions as union president, not opposition to protected concerted union activity in general. MERC reasoned that to hold otherwise would mean that an employer would be prohibited from objecting, however remotely, to any action taken by a union official and that the statute was not intended to insulate union officers in this manner. We agree.

When Tibbets commented in his evaluation that Verburg was "off the machine often," Connors struck the comment from the rating sheet as a precautionary measure because it might have been interpreted as meaning that Verburg's absence from the workplace, which may have been related to his union obligations, was being used against him. Tibbets confirmed to Connors that even without the absence consideration, he would not recommend Verburg for promotion. Verburg claimed that Staal and Hickey issued two letters of instruction to Verburg citing him for unshined shoes, blackened blaster shields, and an unmarked spray bottle to harass him or to retaliate against him for his actions as union president. MERC found that the department has used such letters in the past and that other officers have been cited for similar violations. Furthermore, MERC found that the evidence showed that letters

of instruction did not constitute discipline and that Staal recommended Verburg for promotion in 1996, despite his criticism of Verburg in 1995. MERC correctly concluded that the union had failed to meet its burden of proving that the senior officers who took part in the promotional process were motivated by antiunion animus when they evaluated Verburg.

Similarly, MERC held that, in the case of chief Connors, the union had failed to prove that Verburg's protected activity was a motivating cause of the allegedly discriminatory action. MERC found that the evidence showed that Connors relied heavily on the evaluations and recommendations of the senior officers because he believed that it was important that the senior officers felt comfortable working with the candidate chosen for promotion. Furthermore, MERC noted that Verburg received negative evaluations in both 1995 and 1996, while the candidates who were promoted were recommended by all of the evaluators, and that the remarks made by Connors that "you could be captain someday" or that Verburg would understand the ratings of the other officers if he "searched deeply" were far too vague and ambiguous for it to conclude that they were discriminatory. MERC found it significant that Connors met with some of the evaluators to ensure that their evaluations were not related to union activities, that he testified that his recommendations were not in any way influenced by Verburg's union activities, and that he had caused a letter of instruction (issued by Hickey) to be removed from Verburg's file after he determined that it was based on a miscommunication. MERC's conclusion that Connors' decision was not motivated by antiunion animus was based on competent, material, and substantial evidence on the record.

We affirm.

/s/ Richard A. Bandstra

/s/ Kathleen Jansen

/s/ William C. Whitbeck