

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
NORTHERN MICHIGAN UNIVERSITY CHAPTER,
Respondent-Labor Organization,

Case No. CU03 A-007

-and-

JOSEPH SABOL,
An Individual Charging Party.

APPEARANCES:

Gregory, Moore, Jeakle, Heinen & Brooks, P.C., by Gordon A. Gregory, Esq., for Respondent

Joseph Sabol, in Propria Persona

DECISION AND ORDER

On September 29, 2003, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order on Motions for Summary Disposition in the above matter, recommending that the Commission grant Respondent's motion for summary dismissal and deny Charging Party's motion for summary judgment. Finding that the facts alleged by Charging Party Joseph Sabol failed to show that Respondent American Association of University Professors, Northern Michigan University Chapter, breached its duty of fair representation, the ALJ concluded that the charge failed to state a claim upon which relief can be granted under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210.

Charging Party filed timely exceptions to the ALJ's Decision and Recommended Order on November 21, 2003. In his exceptions, Charging Party argues that the ALJ should have found that Respondent violated its duty of fair representation. Charging Party asserts that Respondent should have filed a grievance on his behalf because his employer, Northern Michigan University (NMU), failed to properly consider him for a term appointment. Charging Party also contends that Respondent should have filed a grievance challenging a defective evaluation.

Facts:

The facts alleged by Charging Party have been set forth in the ALJ's opinion and need not be repeated in detail here. The collective bargaining agreement between Respondent and Northern Michigan University provides for tenure, tenure earning, and term appointments. Term appointments are normally for two (2) years subject to satisfactory evaluations. The contract states: "Term appointments for less than two (2) years may be made for such reasons as late resignation, illness of regular faculty, enrollment requirements, program demands, or replacements for leaves of absence and sabbatical leaves." The contract also provides: "Persons employed on two (2) year Term appointments shall be given first consideration for newly authorized two (2) year Term appointments, provided they meet the qualifications specified for the position."

The contract delineates a detailed procedure for faculty evaluations. Evaluations for other than tenure or promotion proceed upon a designated schedule which includes dates for the departmental evaluation committee's submission to the department head, and the department head's statement of concurrence or nonconcurrence. Evaluations that do not relate to tenure or promotion must be signed by the dean.

NMU hired Charging Party to serve as a chemistry teacher for one academic year, covering the months of August 22, 2001, through May 8, 2002, and to teach chemistry during the following summer semester, from May 8, to July 9, 2002. In May of 2002, NMU decided to hire a professor for a term appointment in the chemistry department for the 2002-03 academic year, but did not offer Charging Party that appointment. Charging Party complained to Respondent that he should have received first consideration for the term appointment and that it should file a grievance on his behalf.

Discussion and Conclusions:

Charging Party contends that the ALJ erred in concluding that Respondent did not breach its duty of fair representation by declining to file a grievance on his behalf. He argues that he was entitled to "first consideration" for a term appointment and that NMU's failure to give him such consideration, violated the contract. He claims Respondent was obligated to file a grievance over the issue, and because it refused, it breached its duty of fair representation.

To establish a claim for a breach of duty of fair representation, a charging party must show that the union acted arbitrarily, discriminatorily, or in bad faith. *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Vaca v Sipes*, 386 US 171, 177 (1967). A union has considerable discretion in deciding whether or not to file a grievance. *Detroit Federation of Teachers*, 2001 MERC Lab Op 322; *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 146 (1973).

As the ALJ noted, Respondent reacted to Charging Party's concerns with diligence. It disagreed, however, with Charging Party's claim that NMU violated the contract. The contract provided that faculty with two-year term appointments receive first consideration for a subsequent two-year term appointment. Because NMU employed Charging Party for only one

year, Respondent reasonably concluded that Charging Party was not entitled to first consideration.

Charging Party claims that NMU had previously given consideration to incumbent term appointees for rehire. The contract required NMU to give consideration to two-year term appointees. Any consideration it may have given to appointees of less than two terms was discretionary and not a matter of contractual obligation. Under the management rights clause of its contract with Respondent, NMU retained the right to hire all employees, subject only to the “express and specific terms” of that contract. The discretionary consideration alleged by Charging Party was not required by the express and specific terms that bind NMU.

Charging Party also claims that the administrative evaluation of his performance was defective because it was not accompanied by a recommendation regarding reappointment or the department head’s concurrence or nonconcurrence. As to these alleged defects, Charging Party admits that he did not press the issue. Charging Party also complains that the dean did not sign the evaluation document. We fail to see why this required Respondent to file a grievance. Charging Party was not being considered for tenure or promotion; thus, whether the dean signed Charging Party’s evaluation was ultimately inconsequential.

We have carefully considered Charging Party’s remaining arguments and find them to be without merit. For the reasons set forth above, we adopt the ALJ’s Decision and Recommended Order.

ORDER

The charge in this matter is hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch, Commission Chairman

Harry W. Bishop, Commission Member

Nino E. Green, Commission Member

Dated: _____

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Individual Charging Party

APPEARANCES:

Gregory, Moore, Jeakle, Heinen & Brooks, P.C., by Gordon A. Gregory, Esq., for the Respondent

Joseph E. Sabol, in pro per

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE
ON MOTIONS FOR SUMMARY DISPOSITION

On January 31, 2003, Joseph E. Sabol filed the above charges against the American Association of University Professors, Northern Michigan University Chapter, alleging that the Respondent breached its duty of fair representation toward him in violation of Section 10(3)(a)(i) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10). The case was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission.

On May 21, 2003, Respondent filed a motion for summary disposition under Commission Rule 165, R 423.165(2), asserting that Charging Party had failed to state a claim upon which relief could be granted, there were no genuine issues of material fact, and the Commission lacked jurisdiction over the subject matter of the charge because the charge alleged only a contract dispute. On September 2, 2003, Sabol filed a response and brief in opposition to Respondent's motion. Sabol also filed his own motion for summary disposition pursuant to R 423.165 (2)(e). Sabol asserted that he was entitled to summary disposition as a matter of law because Respondent had failed to file an answer. Sabol also asserted that no genuine issue of material fact

existed, and that he was entitled to summary judgment as a matter of law. On September 15, 2003, Respondent filed a response in opposition to Sabol's motion. Neither party requested oral argument on its motion pursuant to R 423.161(4). Based on the facts as set forth in Charging Party's pleadings, and the arguments set forth in both parties' motions and briefs, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

From August 2001 until July 2002, Sabol was employed as chemistry professor at Northern Michigan University (the University) under a term appointment. Sabol was a member of the faculty bargaining unit represented by the Respondent. Sabol sought, but did not receive, a term appointment for the 2002-2003 academic year. Sabol alleges that Respondent violated its duty of fair representation by failing to investigate substantive and procedural contract violations related to the University's failure to reappoint him. He also alleges that Respondent violated its duty of fair representation in August 2002 by refusing to file a grievance on his behalf.

Facts:

The facts below were set forth in Sabol's charge and pleadings, including his response to Respondent's motion and Sabol's own motion for summary disposition.

Sabol was appointed by Northern Michigan University (the University) to teach analytical chemistry beginning with the fall term of the 2001-2002 academic year. The initial term of his employment was August 22, 2001 through May 8, 2002. Respondent's collective bargaining contract with the University provides for three types of faculty appointments, tenure, tenure earning, and term. Section 5.1.1(b) of the contract sets forth the conditions of a term appointment:

Term appointments . . . shall normally be made for two (2) years subject to satisfactory evaluation. Term appointments for less than two (2) years may be made for such reasons as late resignation, illness of regular faculty, enrollment requirements, program demands, or replacements for leaves of absence and sabbatical leaves. *Persons employed on two (2) year Term appointments shall be given first consideration for newly authorized two (2) year Term appointments, provided they meet the qualifications specified for the position.* Persons on Term appointments who already hold the appropriate terminal degree shall be given serious consideration for new Tenure Earning positions, provided they meet the qualifications specified for the position. [Emphasis added]

In May 2001, a tenured professor teaching analytical chemistry retired. As noted above, the University hired Sabol on a contract covering one academic year beginning in August 2001. The University's intent was to fill the vacancy with a tenure earning faculty member by the beginning of the 2002-2003 academic year, for which it needed to conduct a search.

The collective bargaining agreement contains detailed provisions with respect to faculty evaluations. Per Section 5.4.1, tenured full professors are to be evaluated every three years and

all other faculty every year. The normal evaluation period is a year, except for faculty members applying for tenure or promotion. Section 5.4.1.2 states that the evaluation shall focus on the faculty member's effectiveness in meeting assigned responsibilities, including teaching where applicable, professional development, and service endeavors. It also states that for teaching faculty, the evaluation shall include student evaluations from each course. Section 5.4.1.2 includes the following paragraph:

Evaluation statements shall conclude with a recommendation regarding continued appointment or termination of appointment for a faculty member progressing toward tenure and/or promotion. The evaluation statement shall indicate whether the faculty member is making the expected progress, and what goals or criteria must yet be achieved in order to be recommended for tenure and/or promotion. *In the case of applications for promotion and/or tenure, there should be a recommendation regarding the application, accompanied by reasons for the recommendation.* [Emphasis added]

The evaluation process begins with the preparation of an evaluation statement by the faculty member himself. Per Section 5.4.1.6 of the contract, a faculty member's yearly evaluation also includes a statement by the departmental evaluation committee. The contract specifies in detail what that statement is to include. Section 5.4.1.6 (f) provides that for teaching faculty, the committee's statement must include an interpretative analysis of student evaluations. Section 5.4.1.6(h) states that the committee's evaluation statement must include:

A concluding section consistent with Section 5.4.1.2 regarding recommendation on continuation or termination of appointment, *and in the cases of application for tenure or promotion, a recommendation of concurrence or nonconcurrence for the application accompanied by reasons for the recommendation.* [Emphasis added]

Per Section 5.4.1.7, the evaluation must also include a signed statement by the department head addressing the faculty member's performance. Section 5.4.1.8 states that for evaluations not involving application for promotion and/or tenure, a faculty member shall review the completed evaluation before it leaves the department, and shall have the right to add any written comments or printed material before signing it. The department head then forwards the completed evaluation to the dean, who also signs it.

In accord with its original plan, during the 2001-2002 academic year the University commenced a search for a tenure earning faculty member in the field of analytic chemistry. On January 10, 2002, Sabol applied for the tenure earning analytical chemistry position. On February 14, 2002, Eugene Wickenheiser, head of the chemistry department, told Sabol that he had advanced to the status of semi-finalist for the tenure earning analytical chemistry vacancy. Sabol was also selected to teach courses in chemistry for the summer of 2002, with a contract term of May 8, 2002 to July 9, 2002.

Faculty members receive a calendar year, rather than academic year, evaluation. Sabol was evaluated for the 2001 calendar year in April 2002. In his case, the evaluation was based on his work for the fall semester of the 2001-2002 academic year. The department evaluation committee evaluated him primarily on his assigned duties, teaching. In its evaluation statement, the committee noted that for two of Sabol's classes, his student evaluations were 70% positive, which the committee stated was acceptable, but below the norm for the department. For two other classes, his student evaluations were less than 50% positive, and for the laboratory he taught the positive response was 60%. The committee concluded that while Sabol was available to his students and creative in his approach, he might want to rethink his teaching methods and style in light of the type of students in his courses. The committee's evaluation statement did not include any recommendation for continuation or termination of his appointment. Per the contract, Sabol's evaluation also included a statement by Department Head Wickenheiser. Wickenheiser made several positive statements about Sabol's performance. However, Wickenheiser noted that Sabol had taught discussion sections with acceptable, but lower than average student evaluations of teaching. Wickenheiser also stated that Sabol had taught lectures and a lab course in which, according to Wickenheiser, "his student evaluations were low enough to be considered as unsatisfactory." Wickenheiser suggested that for the next evaluation period, Sabol add a goal directly targeted towards the improvement of his instruction." Sabol signed the evaluation on May 15, 2002. His evaluation was forwarded to the dean. For reasons unknown, Sabol's evaluation was placed into his personnel file without being signed by the dean.

Sabol did not advance to the finalist round in the search to fill the tenure earning analytical chemistry position. In May 2002, the University terminated its search for a tenure-earning faculty member, and decided to hire a faculty member on a term appointment. Sabol expressed his interest in the term appointment. He was told that from the semifinalist pool, only two applicants – Sabol and an external applicant – were interested in the term appointment. At some point before June 5, 2002, Sabol asked Wickenheiser if he would be given the term appointment. Wickenheiser would not promise him the appointment. Wickenheiser told Sabol that the University was not required to give him "first consideration" for the position under Section 5.1.1(b) of the collective bargaining agreement because Sabol had not had a two-year contract.

In late May 2002, a number of faculty with term appointments received offers of new term appointments for the upcoming academic year. Sabol received no offer. On June 5, 2002, Sabol sent Wickenheiser and James Greene, Respondent's grievance officer, a memo stating that he was concerned that some part of the Master Agreement and Chemistry Department bylaws had not been followed in the filling of the analytical chemistry term position. Sabol asked if he was eligible for "first consideration" for a new term appointment under Section 5.1.1 (b) since his initial appointment had been only for one year. He asked whether the new term appointment was for one or two years. He also asked what constituted a "satisfactory evaluation" under Section 5.1.1 (b). Sabol stated that he had submitted his 2002 evaluation, and was not aware that it was unsatisfactory. Finally, he asked about a "rumor" in the department that the applicant pool for the term position might be expanded. On June 11, Green e-mailed a reply:

"First consideration" and "serious consideration" are, of course, products of much negotiation. What they do not no[sic] is guarantee that present term appointees

will get the next tenure track or term appointment. But they mean, in the eyes of the union at least, that other things being equal a present term appointee would get a renewal before an outsider would be given a term position. The crucial phrase is “other things being equal.” What this comes down to is “How well did you do this past year” in the eyes of your colleagues and the department head. Do you have a copy of their part [of the evaluation] that I could look at. If it is negative, they are probably off the hook. But if it is quite positive, there may be something we can do.

Sabol sent Greene a copy of his 2001 evaluation and Sabol’s own evaluation statement covering the second semester of the 2001-2002 academic year. Sometime between June 5 and early July 2002, the University extended an offer to an outside candidate for the analytical chemistry term position.

On July 3, 2002, Sabol e-mailed Greene. Sabol stated that he believed the department should have looked at his report for the winter semester before making an offer to another person. He asked Greene if he could get the department’s records concerning this hiring, and asked how or when the department determined the other person was more qualified. Sabol asked Greene what the standard was to determine whether an in-house incumbent was “equal/better/worse” than an external candidate. Sabol wrote, “I sense you are not enthusiastic about filing a grievance, but it still seems to me that I was bypassed and another person was let in. Is it appropriate to file a grievance over the fact that the department did not give me consideration? What actually is ‘consideration;’ can you add to what you said on June 11?” Greene replied on the same day, telling Sabol that he would talk to Respondent’s attorney to see if he thought there was anything that could be grieved.

On July 8, Sabol reported to Greene that he had spoken to Wickenheiser, and that Wickenheiser again took the position that the “first consideration” language did not apply to Sabol because he had a one-year contract. On July 9, Greene told Sabol that he had consulted with Respondent’s attorney. According to Greene, the attorney had stated that unless there was evidence of discrimination based on age or some other protected factor, the union had no grievance. Greene told Sabol that the attorney had advised him that since the contract stressed that teaching was a primary responsibility and student evaluations must be conducted for each class, low student evaluations would provide a basis for hiring an outside candidate even when the inside candidate was given “first consideration.” Sabol replied that the point was that he was not given first consideration. Greene wrote back that he would discuss the issues again with Respondent’s attorney, as well as with Respondent’s president.

During the latter part of July, Sabol sent Greene several other lengthy e-mails arguing that the contract had been violated when Respondent did not give him a new contract. On July 30, Greene wrote:

As I have indicated a number of times, the situation you are in is not that of being fired but of not being re-hired. The grounds for not rehiring need not be as strong as the grounds for firing. Comparatively low student evaluations for a key course

CH241 would, in my judgment and that of our attorney, be considered sufficient grounds for not re-hiring.

On August 8, Greene notified Sabol that Respondent's executive committee had voted unanimously not to file a grievance on his behalf. Greene stated that an investigation had disclosed that all candidates for the chemistry term appointment had been asked to submit student evaluations. He stated that Section 5.4.1.6, requiring a recommendation of continuation or termination of employment, did not apply to one-year term appointments, since the section said that its activation must be consistent with 5.4.1.2, which applied only to faculty progressing toward tenure and/or promotion. Greene also told Sabol that since faculty in the chemistry department were not required to do evaluation statements for each semester, there was no obligation for the department to consider Sabol's evaluation report on his teaching for the second semester.

On September 24, 2002, Sabol appeared before Respondent's executive committee and argued that Respondent was obligated to go forward with a grievance. The executive committee again refused to file a grievance on Sabol's behalf.¹

Discussion and Conclusions of Law:

Sabol asserts that he is entitled to summary disposition as a matter of law because Respondent failed to file an answer to the charge within 10 days under Commission Rule 155, R 423.155. Filing of an answer is not mandatory under this rule, which states that a respondent "may" file an answer to the complaint and attached charge within 20 days after receipt. R 423.155(1) also states that failure to file an answer shall not constitute an admission of any fact alleged in the charge, or a waiver of the right to assert any defense. I find that Sabol is not entitled to summary disposition based on Respondent's failure to file an answer.

Sabol also argues that Respondent's motion for summary disposition is defective because it did not comply the requirements of the Michigan Court Rules. Under MCL 2.116 (G)(3), a party who files a motion for summary disposition in the Michigan courts on the grounds that "except as to the remedy sought, there is no genuine issue of material fact," must attach to its motion "affidavits, depositions, admissions or other documentary evidence" in support of the motion. The Michigan Court Rules govern practice and procedure in the courts of Michigan, and do not apply to administrative proceedings such as this one. MCL 1.103. I also note that, although Respondent did not attach affidavits to its motion, its motion did include documentary evidence, including parts of Sabol's 2001 evaluation.²

¹ The grievance procedure, Article IV of the contract, does not give an individual faculty member the right to file a grievance; Respondent must file all grievances. Section 4.4. states, "Failing resolution of a problem by informal means, the Association shall initiate the grievance procedure by filing a written grievance . . ." [Emphasis added]. Sabol argued that this language obligated Respondent to file a grievance at his request. However, this language clearly does not require Respondent to file a grievance under any circumstances, but simply describes what Respondent is to do if it wishes to proceed with a grievance beyond the informal stage.

² As Sabol correctly points out, although Respondent refers in its motion to portions of the collective bargaining agreement, it actually attached only the cover sheet of this agreement. This, I assume, was inadvertent. Sabol also relied on portions of the collective bargaining agreement, and attached a copy of the agreement to his pleadings. It is clear from the pleadings that the parties agree on what the contract says, although not what it means.

A union's duty of fair representation under PERA consists of three elements: (1) to serve the interest of all members without hostility or discrimination toward any; (2) to exercise discretion in complete good faith and honesty; and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171, 177 (1967); *Goolsby v Detroit*, 419 Mich 651, 679 (1984). The courts have defined "bad faith" as an intentional act or omission undertaken dishonestly or fraudulently, and "arbitrary" conduct as actions which are "impulsive, irrational, or unreasoned," "undertaken with little care or with indifference to the interests of those affected," or "extreme recklessness or gross negligence." *Goolsby*, supra at 679.

In the area of grievances, a union has considerable discretion to decide which grievances should be carried forward, and is permitted to assess each grievance with a view to individual merit. The union may consider the good of the general membership, and has discretion to weigh the burden on the contractual grievance machinery, the amount at stake, the likelihood of success, and the cost and desirability of winning the award against considerations that affect the membership as a whole. *Knoke v East Jackson PS*, 201 Mich App 480, 486 (1993), aff'g 1991 MERC Lab Op 132; *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123, 146 (1973). See also *Ann Arbor P.S.*, 2003 MERC Lab Op ____ (Case Nos. C01 F-112 and CU01 F-030, decided March 5, 2003) and cases cited therein.

The facts as set forth by Sabol do not demonstrate that Respondent failed to investigate his grievance. Between June 5 and August 8, 2002, Sabol and Respondent's grievance officer, James Greene, had a lengthy extensive e-mail correspondence. During this correspondence, Sabol presented numerous arguments in support of his claim that the University had breached the collective bargaining agreement with respect to his 2001 evaluation, and in its decision not to reappoint him for the 2002-2003 academic year. On June 11, Greene answered Sabol's question about Respondent's interpretation of the term "first consideration." Greene told Sabol that this meant that "other things being equal," a present term appointee should be reappointed before an outsider was given a term contract. On July 9, Greene told Sabol that he had consulted with Respondent's attorney, and that the attorney had advised him that since the contract stressed teaching, low student evaluations would justify the University's hiring an outside candidate even when the inside candidate was given first consideration. In other words, the University could reasonably argue that even if it had given Sabol "first consideration" for the new appointment, it would have rejected him based on his student evaluations. Filing a grievance based on Wickenheiser's statement that Sabol had not been given "first consideration" would, therefore, have been a fruitless act, because Respondent could not force the University to reappoint Sabol under these circumstances.

Even after receiving this advice from his attorney, however, Greene continued to exchange e-mails with Sabol, and to discuss the arguments Sabol continued to raise. On August 8, Greene told Sabol that it was Respondent's position that the University had not violated the contract when the evaluation committee failed to make a recommendation regarding the continuation of his employment in his 2001 evaluation, because the contract did not require that the evaluation of a term employee include a recommendation. Greene also explained why, under Respondent's interpretation, the University did not violate the contract by refusing to consider Sabol's report on his teaching for the second semester. I conclude that the facts as set forth in

Sabol's charge and pleadings do not show that Respondent refused to file a grievance on his behalf out of personal hostility toward him. I also conclude, based on these same facts, that Respondent did not display "indifference" to Sabol's interests, engage in any conduct which could be deemed negligent, or arbitrarily refuse to file a grievance on Sabol's behalf. To the contrary, Greene investigated the facts of Sabol's case, reviewed Sabol's arguments, and brought those arguments to the attention of Respondent's attorney. Respondent disagreed with Sabol's interpretation of several contract provisions, but the positions Respondent took were supported by language in the contract and were neither "irrational" nor "unreasoned."

For reasons set forth above, I find that Sabol has not alleged facts showing a breach of Respondent's duty of fair representation in this case. I recommend that the Commission grant Respondent's motion for summary dismissal, deny Charging Party's motion for summary judgment, and issue the following order.

RECOMMENDED ORDER

The charge in this case is hereby dismissed in its entirety

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____