

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP1991

Cir. Ct. No. 2010CV745

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

LANCE S. DAVENPORT,

PETITIONER-APPELLANT,

V.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION,
MADISON METROPOLITAN SCHOOL DISTRICT AND
MADISON TEACHERS INCORPORATED,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
JUAN B. COLAS, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 SHERMAN, J. Lance Davenport appeals an order of the circuit court affirming the decision of the Wisconsin Employment Relations Commission (the Commission), which dismissed Davenport's claim that Madison Metropolitan

School District and Madison Teachers, Inc. (MTI) committed prohibited practices within the meaning of the Municipal Employment Relations Act and that MTI breached its duty of fair representation to him. We affirm.

BACKGROUND

¶2 Davenport is a former substitute teacher employed by the School District. As a substitute teacher, Davenport was represented by MTI, the collective bargaining representative for teachers employed by the School District.

¶3 During the 2003-04 school year, Davenport worked as a long-term substitute teacher at East High School in Madison. At Davenport's request, MTI contacted the School District to see why Davenport had not received a regular teaching contract for that school year. The School District responded that Davenport had been employed during that school year under a temporary contract from late October 2003 through the end of the school year in June 2004, filling in first for a teacher who had resigned in October and whose position was ultimately eliminated, and later for a teacher who had taken a medical leave of absence.

¶4 In October 2004, MTI filed a grievance on behalf of Davenport with the School District pursuant to the 2003-2005 teacher collective bargaining agreement between the School District and MTI. Davenport asserted that the School District violated the collective bargaining agreement by failing to give Davenport a regular teaching contract for the 2003-04 school year. MTI, which represented Davenport regarding the grievance, and the School District ultimately reached a settlement regarding the grievance, whereby the School District agreed to pay Davenport the difference between the wages he received as a substitute teacher and the higher wage rate paid to employees working under a temporary contract. The School District also advised MTI and Davenport that it would pay

Davenport for substantiated out-of-pocket medical and dental expenses that would have been covered had he been employed under a temporary contract.

¶5 In September 2004, the School District determined that Davenport had resigned as a substitute teacher with the School District because he failed to notify it by September 22, 2004, that he intended to continue substitute teaching for the School District. In February 2005, MTI filed another grievance on behalf of Davenport with the School District, alleging the School District had violated the collective bargaining agreement by determining that Davenport had resigned. According to Davenport, he had left a timely phone message with the School District stating that it was his intent to continue substitute teaching for the district. However, the School District denied having received such a message. Sometime in the spring of 2005, the executive director of MTI advised Davenport that obtaining his phone records confirming the September 22, 2004 call to the School District would be important to his February 2005 grievance. When Davenport attempted to obtain the telephone records, the service provider advised Davenport that it would not release the records to him, but might if such records were sought by subpoena. No such subpoena was ever obtained.

¶6 In February 2005, the same month that Davenport filed his grievance regarding the School District's determination that he had resigned, and requested make-whole relief, Davenport retired, retroactive to sometime in the fall of 2004. In June 2005, after learning about Davenport's retirement, MTI notified Davenport that:

given [his] active status from the beginning of the 2004-05 school year through September 22, 2004, and the subsequent retirement which affirmed the separation date of September 22, 2004, MTI cannot pursue a make[-]whole remedy in this case, and will, therefore, advise the School District of our withdrawal of our grievance.

¶7 In June 2007, Davenport filed a complaint with the Commission, alleging that MTI had breached its duty of fair representation to him in the way that it had handled his October 2004 and February 2005 grievances, and that the School District had violated the collective bargaining agreements. Following a hearing on Davenport's complaint, at which Davenport appeared without legal representation, the Commission hearing examiner issued a written decision wherein he concluded that MTI had not breached its duty of fair representation to Davenport in the way that it handled Davenport's 2004 and 2005 grievances. Having concluded that MTI had not breached its duty of fair representation to Davenport, the examiner declined to determine whether the School District violated the collective bargaining agreements because the grievance and arbitration procedure set forth in the collective bargaining agreements was the exclusive means for litigating alleged violations of the agreements.

¶8 Davenport petitioned the Commission to review the examiner's findings and conclusions. Davenport asserted that the hearing "did not fulfill fair and impartial due process" in a number of respects, and that the examiner erred in his conclusions. With respect to his "fair and impartial due process" assertion, Davenport argued that the examiner erred by: failing to conduct a preliminary hearing on Davenport's complaint; failing to subpoena witnesses and information; failing to grant Davenport a continuance so that he could compel absent witnesses to be present to testify; and failing to ask Davenport if he wished to testify at the hearing. The Commission decided that the examiner erred only by not allowing Davenport sufficient opportunity to testify. In light of that error, the Commission determined that the record was incomplete, and therefore set aside the examiner's decision and remanded the case for an additional hearing before a different

examiner, at which time the new examiner would hear Davenport's testimony and any rebuttal testimony.

¶9 Following the additional hearing, the new examiner concluded that MTI had not breached its duty of fair representation to Davenport. The new examiner also concluded that he would not determine whether the School District violated the collective bargaining agreements because MTI did not breach its duty of fair representation and, thus, the grievance and arbitration procedures set forth in the collective bargaining agreements were the exclusive means for litigating alleged violations of the agreements.

¶10 Davenport petitioned the Commission for review of the new examiner's decision. The Commission affirmed the new examiner's findings of fact and conclusions of law, with only three minor modifications, which are not at issue on appeal. The Commission rejected, among other arguments, Davenport's renewed argument that he was improperly denied the opportunity to present witnesses at the hearing who would support his version of the events, stating that it had previously rejected this assertion in the Commission's prior order, wherein it stated that it was Davenport's responsibility to prepare and present his case, including subpoenaing witnesses. The Commission also rejected Davenport's argument that the examiner and MTI erred in concluding that he retired on September 22, 2004. The Commission stated that Davenport's focus was misdirected and that "[t]he actual date of his retirement is less significant than whether MTI reasonably and in good faith believed that his retirement was retroactive to somewhere at or around September 22, 2004," and it found that "[i]t was MTI's belief, reasonably based, that led MTI to its ultimate conclusion that Mr. Davenport would not be able to obtain a make-whole remedy for his termination grievance." In addition, the Commission rejected Davenport's

argument that the examiner’s finding that Davenport was advised by an employee of MTI that his retirement would not negatively affect his available remedies was inconsistent with the record. The Commission stated that to the contrary, MTI’s employment counselor informed Davenport that if he retired, “any issue he would have after the date of his retirement would be rendered moot, he could not have a retirement that he exercised and then have a claim for further wages beyond his retirement date.”

¶11 Davenport sought review in the circuit court, which affirmed the Commission’s decision. Davenport appeals.

STANDARD OF REVIEW

¶12 On appeal of an administrative agency decision, we review the decision of the agency, not the decision of the circuit court. *Hilton v. DNR*, 2006 WI 84, ¶15, 293 Wis. 2d 1, 717 N.W.2d 166. We will not disturb an agency’s factual findings unless they are not supported by substantial evidence. WIS. STAT. § 227.57(6) (2009-10); *Clean Wis., Inc. v. Public Serv. Comm’n*, 2005 WI 93, ¶46, 282 Wis. 2d 250, 700 N.W.2d 768. “An agency’s [factual] findings are supported by substantial evidence if a reasonable person could arrive at the same conclusion as the agency, taking into account all the evidence in the record.” *Id.* The application of those factual findings to the legal standard is a question of law which this court reviews de novo. See *State v. Lala*, 2009 WI App 137, ¶8, 321 Wis. 2d 292, 773 N.W.2d 218.

DISCUSSION

¶13 Davenport challenges the Commission’s factual findings and conclusions in two distinct respects. We address each in turn below.

A. *Examiner's Refusal to Subpoena Telephone Records and Allow Davenport Additional Time to Call Additional Witnesses*

¶14 Davenport contends that the Commission erred in affirming the Commission Examiner's order because, at the first and second hearings, the examiners failed to allow him an additional opportunity to subpoena telephone records and call witnesses. Davenport argues that "[i]t was unreasonable, unfair and an abuse of discretion for the [Commission] not to allow him the opportunity to present the witnesses and evidence he needed" because he proceeded pro se throughout the proceedings and was thus unaware that it was his responsibility to see to it that the witnesses he wanted were at the hearing and that the subpoenas he needed were issued. He asserts that "[t]here is no reason that the [Commission] could not also have allowed [him] an opportunity, subject to reasonable limitations, to subpoena the telephone records and witnesses he needed to support his testimony at the second hearing."

¶15 The decision to grant or deny a continuance is within the Commission's discretion. *State v. Wollman*, 86 Wis. 2d 459, 468, 273 N.W.2d 225 (1979). We will sustain a discretionary determination if the relevant facts were examined, a proper standard of law was applied and a conclusion was reached that a reasonable judge could reach. *See State v. Sullivan*, 216 Wis. 2d 768, 780-81, 576 N.W.2d 30 (1998).

¶16 In upholding the hearing examiner's refusal to continue the hearing in order to subpoena additional evidence on Davenport's behalf and in order to afford Davenport an additional opportunity to call witnesses, the Commission stated:

in the final analysis, litigants before the Commission, including those who are unrepresented, bear the ultimate responsibility for learning about the complaint process and

being prepared to present their case during the hearing. Thus, as a general matter, it remains within an examiner's discretion to hold litigants accountable for the extent of their understanding or lack thereof of complaint procedures.

....

... If a Commission examiner were to determine which witnesses should appear at a complaint hearing and subpoena those witnesses to testify on the behalf of a party, the examiner would be serving as an advocate. It was Davenport's responsibility to subpoena any witnesses that he wanted to be present and potentially testify at the complaint hearing. Where, as here, a litigant asks for a continuance based on a misunderstanding as to how the subpoena process works and/or who would be present to testify at the hearing, an examiner has broad discretion when determining whether to grant or deny such a request ... because it is ultimately the litigant's responsibility to understand the Commission's complaint procedures, the [e]xaminer did not err by denying Davenport's request for a continuance.

¶17 Davenport has not cited to any authority suggesting that the hearing examiner was required to continue the hearing to afford him additional time to present his case because he was proceeding pro se and was unaware of the correct procedures for obtaining the telephone records and calling witnesses prior to the original hearing. "The right to self-representation is '[not] a license not to comply with relevant rules of procedural and substantive law.'" *Waushara County v. Graf*, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992) (quoted source omitted). It is a general principal that pro se litigants "must satisfy all procedural requirements" and courts are not required to overlook their failure to comply with procedural rules. *Id.* Moreover, what is at issue here is not a procedural fine point. Parties are responsible for taking necessary basic steps to present their evidence at contested hearings. Accordingly, we conclude that it was not an erroneous exercise of the Commission's discretion to decline Davenport's request for additional opportunity to subpoena evidence and call witnesses.

B. MTI's Duty of Fair Representation

¶18 Davenport next contends that the Commission's finding that MTI did not breach its duty of fair representation is not supported by substantial evidence.

¶19 The duty of fair representation arises from a union's statutorily created exclusive ability to negotiate collective bargaining agreement, and to decide whether to arbitrate grievances regarding the meaning and application of such agreements. *Service Emps. Int'l Union Local No. 150 v. WERC*, 2010 WI App 126, ¶19, 329 Wis. 2d 447, 791 N.W.2d 662. A union does not breach its duty of fair representation merely because it settles a grievance short of arbitration. *Id.*, ¶20. "Rather, a breach of the duty of fair representation 'occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.'" *Id.* (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)). Thus, unions have considerable latitude in deciding whether to pursue a grievance through arbitration, *Mahnke v. WERC*, 66 Wis. 2d 524, 531, 225 N.W.2d 617 (1975), and "[e]ven if an employee claim has merit, [the] union may properly reject it unless its action is arbitrary or taken in bath faith," or is discriminatory. *Service Emps. Int'l Union Local No. 150*, 329 Wis. 2d 447, ¶20 (internal quotations omitted). The burden ultimately lies with the employee to prove that his or her union breached its duty of fair representation. *See DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983); *Mahnke*, 66 Wis. 2d at 533.

¶20 Davenport argues that the evidence supports a finding that MTI settled his first grievance and withdrew his second grievance because MTI bore hostility toward him and thus acted in bad faith. Davenport asserts that the

indirect, or circumstantial evidence, makes clear that MTI never intended to pursue Davenport's grievances to arbitration or obtain a favorable settlement for Davenport. According to Davenport, this evidence includes the following: the executive director of MTI was angered by an accusation by Davenport that the executive director was conspiring against him with a member of the Madison school board; Davenport and the executive director had "a number of unpleasant encounters" in which Davenport put the executive director "on the spot about MTI's lack of progress on his grievances"; Davenport had in the past "repeatedly [taken] unpopular stands on behalf of learning disabled or emotionally disabled students against fellow teachers as well as school administrators, and often accused them of wrongdoing or incompetence"; Davenport had in the past testified in court and filed legal documents against teachers and administrators; and Davenport had "reported sexual misconduct and physical abuse on the part of teachers and disabled students to parents, educators and administrators."

¶21 Davenport acknowledges that MTI is not directly linked to any of the incidents described above, but claims that because union representatives were occasionally at meetings in which Davenport would confront union members and administrators in a "critical or accusatory fashion," "[i]t is reasonable to infer that [the executive director of MTI] and other MTI officials knew of Davenport's activities and reputation in this regard and disapproved of them." Davenport concludes that "[t]aken all together, this evidence creates a great weight and clear preponderance of the evidence supporting the conclusion that MTI acted out of hostility toward [him]."

¶22 Our standard of review, however, is not whether the facts proffered by Davenport supply evidence supporting his claim that MTI's actions were arbitrary or in bad faith. Rather, we must determine whether there is substantial

evidence supporting the Commission's finding that MTI pursued Davenport's grievances in good faith. *Clean Wis., Inc.*, 282 Wis. 2d 250, ¶46. We have reviewed the evidence and conclude that there is.

¶23 With respect to Davenport's first grievance, the evidence reflects that during the 2003-04 school year, Davenport was employed as a substitute teacher with the School District, first in a teaching position that was subsequently eliminated, and later for a teacher who had taken a medical leave of absence. There is no evidence that there was a permanent teaching position to which Davenport was entitled. Thus, the evidence supports the Commission's finding that MTI acted in good faith when it negotiated a settlement whereby the School District agreed to compensate Davenport at the higher rate paid to teachers under temporary teaching contracts, rather than the lower rate he was originally paid as a substitute.

¶24 With respect to Davenport's second grievance, the evidence reflects that Davenport requested make-whole relief. As noted above, MTI's retirement counsel testified that he advised Davenport that if he retired, "any issue he would have after the date of his retirement would be rendered moot, he could not have a retirement that he exercised and then have a claim for further wages beyond his retirement date." Davenport subsequently retired retroactively to sometime in the fall of 2004, an action MTI believed prevented Davenport from obtaining make-whole relief for his second grievance, and mooted the issue of the phone records. This evidence supports the Commission's findings that MTI declined to further pursue Davenport's second grievance, not in bad faith or for arbitrary reasons, but instead because it reasonably believed that Davenport's retirement negatively affected the make-whole remedy he sought and, therefore, supports the

Commission's determination that MTI did not breach its duty of fair representation.

¶25 Because there is substantial evidence supporting the Commission's finding that MTI did not act in bad faith or in an arbitrary fashion, and thus did not breach its duty of fair representation to Davenport, we affirm.

CONCLUSION

¶26 For the reasons discussed above, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

