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DIVISION III
STATE OF WASHINGTON
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No. 316360-III

COURT OF APPEALS, DIVISION III OF THE STATE OF
WASHINGTON

Michael E. Doron, Ph.D., Apellant,

v.

Eastern Washington University, United Faculty of Eastern Washington
University, United Faculty of Washington State, and Washington
Education Association, Respondents.

BRIEF OF RESPONDENTS UNITED FACULTY OF EASTERN
WASHINGTON UNIVERSITY, UNITED FACULTY OF
WASHINGTON STATE AND WASHINGTON EDUCATION
ASSOCIATION

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TABLE OF CONTENTS

Statement of the Case.....	1
Response to Plaintiff’s Statement of the Case	14
Argument	22
1. Standard of Review.....	22
2. The UFE did not breach its duty of fair representation	23
3. The WEA and the UFWS did not interfere with any contract or business expectancies of Dr. Doron	29
Conclusion	36

TABLE OF CASES

<i>Cavanaugh v. Southern California Permanente Medical Group, Inc.</i> , 583 F. Supp. 2d 1109, 1128-1129 (C.D. Cal. 2008).....	23, 26
<i>Jones v. Allstate Insurance Company</i> , 146 Wn. 2d 291 (2002)	22
<i>Lindsey v. Municipality of Metropolitan Seattle</i> , 49 Wn.App. 145 (1987)	23-24, 28
<i>Mega v. Whitworth College</i> , 138 Wn. App. 661 (2007).....	37
<i>Merritt v. International Association of Machinists and Aerospace Workers</i> , 613 F. 3d 609, 619 (CA 6th 2010).....	27
<i>Muir v. Council 2, Washington State Council of County and City Employees and Local 1849, AFSCME, AFL-CIO</i> , 154 Wn.App. 528, 531 (2010)	23, 24

<i>Newton Insurance Agency and Brokerage, Inc. v. Caledonian Insurance Group, Inc.</i> , 114 Wn. App. 151, 158 (2002).....	34, 36
<i>Pacific Northwest Shooting Park Association v. City of Sequim</i> , 158 Wn. 2d 342, 351 (2006)	31, 33, 34
<i>Peterson v. Kennedy</i> , 771 F.2d 1244 (9 th Cir. 1985)	28
<i>Schmidtke v. Tacoma School District</i> , 69 Wn. App. 174, 181 (1993)	26

STATUTES

RCW 49.48.030	36
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TABLE OF OTHER AUTHORITIES

44B Am. Jur. 2d, Interference, section 57	31
RAP 10.1(g)	22
RAP 18.1	36, 37

STATEMENT OF THE CASE

The United Faculty of Eastern Washington University (UFE) is a labor organization that represents faculty members employed by Eastern Washington University (EWU) with regard to the terms and conditions of their employment. Gary Krug, a professor in the Communications Studies Department, was President of the UFE from the summer of 2009 until June 31, 2012. In that capacity, he represented faculty members in disciplinary matters and filed grievances regarding violations of the collective bargaining agreement (CBA). CP 2059-2060.

Michael Doron contacted Dr. Krug in an email dated October 30, 2010 and requested that he speak to him regarding issues relating to his Faculty Activity Plan (FAP) and reappointment. He also stated in the email that he was being asked to develop an improvement plan. Dr. Doron was a probationary tenure-track professor in the Accounting and Information Systems (AIS) Department who had not acquired tenure at the time he contacted Dr. Krug. The AIS Department is in the College of Business and Public Administration. CP 2060.

The FAP is a document drafted by a faculty member that outlines the professional activity and expected performance of the faculty member in the areas of teaching, research and scholarship, and service to the

university and the community. Improvement plans are authorized in section 5.3.1(b) of the CBA. That section provides the following:

As part of the evaluation process, the department/library will provide the faculty member with an annual assessment of the progress on the FAP and a recommendation regarding probationary status. The evaluation will be signed by the faculty member and retained in his/her official personnel file in the Human Resources Office. If performance shortcomings are identified through the evaluation process, the probationary faculty member shall be provided with a plan to correct the performance shortcomings which includes timelines for improvement. The plan will be created by the chair and the affected probationary faculty member, and will be approved by the department/library personnel committee, the college personnel committee (if applicable), the dean and the Chief Academic Officer. CP 2060-2061.

Dr. Doron met with Dr. Krug on November 2, 2010. He informed Dr. Krug at the meeting that he thought he was being forced to participate in drafting an improvement plan and changing the area of research set forth in his FAP which required him to do research in accounting history only. Dr. Krug met with Dr. Doron again the next day to review his FAP. At that point, Dr. Krug decided a meeting should be scheduled to determine the nature of issues concerning Dr. Doron's performance. CP 2061.

On November 9, 2010, Dr. Krug met with Elizabeth (Murff) Tipton, Chair of the AIS Department, Neal Zimmerman, Dean of the College of Business and Public Administration, and Arsen Djatej, a representative of the department personnel committee (DPC). Dr. Doron also attended the meeting. Dr. Zimmerman stated at the meeting that Dr. Doron's FAP only

required him to do research in accounting history. He further stated that if he did not do research in contemporary accounting practices, the courses he taught would not meet accreditation standards because he taught accounting, not accounting history. Dr. Tipton also stated that she had concerns regarding his teaching and that there were issues regarding student evaluations of his courses as well as student complaints she had received. Additionally, she indicated that administrators had expressed concern about his teaching in the MBA program and the appropriateness of his course content. CP 2061.

On November 18, 2010, Dr. Krug met with Dr. Doron, Dr. Tipton and Dr. Djatej. Dr. Krug stated at the meeting that Dr. Doron took the position that he was not required to do research in contemporary accounting practices because his FAP only required him to do research in accounting history. Dr. Tipton stated that Dr. Doron was told before he accepted his position with EWU that he would be required to conduct research in contemporary accounting practices to comply with policies regarding accreditation. Dr. Doron did not deny this was said prior to his acceptance of his position. CP 2061-2062.

In the fall of 2010, Dr. Doron was evaluated by Dr. Tipton, Dr. Zimmerman and three members of the DPC. These evaluations indicated,

among other things, that Dr. Doron had problems with his teaching, course development and research. CP 2062.

In an email dated November 19, 2010, from Dr. Doron to Dr. Krug, Dr. Doron asked Dr. Krug if the UFE would be willing to, “file a formal grievance stating that the evaluations are in violation of the CBA.” He also stated in the email that the evaluations had to be based on his progress in meeting his FAP. Dr. Doron felt that because his evaluations criticized his research in accounting history only, they were not based on his progress in meeting his FAP. CP 2062.

In an email dated November 21, 2010, Dr. Krug stated that after consulting with the UFE Executive Board, he had significant concerns regarding the FAP as a document. In particular, Dr. Krug stated that the FAP failed to meet specific criteria for a FAP in section 7.3.1 of the CBA and that parts of it were extremely vague making assessment of whether the FAP was adequately complied with difficult if not impossible. CP 2062.

After reviewing Dr. Doron’s FAP and discussing it with other faculty members, Dr. Krug determined that his FAP had significant problems. These problems included the following:

- a. The FAP lacked specificity. As a result, Dr. Doron did not know exactly what he was required to do to acquire tenure.

b. Section 7.3.1 of the CBA states that, “Where the FAP is intended to lead to tenure and/or promotion the plan shall so state.” Dr. Doron’s FAP did not state that his FAP intended to lead to tenure.

c. Section 7.3.1 of the CBA requires that the FAP be consistent with the policies and procedures of the particular department. Appendix 2 of the AIS Department’s policies and procedures states that teaching effectiveness will be measured by, among other things, 1) Maintenance of course currency by revising and updating course content; 2) Preparation and distribution of course syllabi for all courses taught; 3) Meeting class assignments; 4) Student advisement and regular availability to students by phone, email or office contact; and 5) Quality teaching as measured by a mix of student and non-student evaluation factors. Dr. Doron’s FAP provided only that his teaching effectiveness would be measured against an average median rating of 3.0 for his classes over the life of the FAP and that he would be available to advise students by office contact, email and voice mail. Dr. Doron’s FAP also lacked other measurements of teaching effectiveness including student comments and peer evaluation.

d. With regard to the “Quality of Research and Scholarship” section of Dr. Doran’s FAP, this section did not include the accreditation standards by which his research would be measured as required by the department and college policies and procedures. CP 2062-2063.

The UFE was also interested in insuring that Dr. Doron's FAP complied with the CBA and was specific enough to put him on notice of EWU's expectations for acquiring tenure because FAPs are an important issue for all faculty members. The FAP determines the path of the faculty member for retention, the acquisition of tenure and promotion to associate and full professor. The UFE did not want to establish a practice of pursuing faculty FAPs that did not comply with the CBA. CP 2064.

The CBA also provides that FAPs can be modified prior to the award of tenure. Section 7.3.5 provides that, "FAPs may be modified during their term. A faculty or the chair may request in writing a modification. All modifications are subject to the same approval process as the original FAP." Under section 5.3.1, FAPs can be modified by mutual agreement between the faculty member, chair, personnel committee, dean and Chief Academic Officer. CP 2064.

Dr. Krug declined to file a grievance stating that Dr. Doron's evaluations were in violation of the CBA because the FAP did not comply with the CBA and such a grievance would not advance Dr. Doron's efforts to obtain tenure. CP 2064.

In an email dated November 22, 2010, Dr. Krug stated to Dr. Doron that the UFE would recommend that Dr. Doron's FAP be rejected because it did not comply with the CBA and that a new FAP that met the

requirements of the CBA be drafted by the end of the winter quarter. In an email dated December 6, 2010 from Dr. Doron to Dr. Krug, Dr. Doron stated that he was given a new Faculty Workload that assigned him courses he had never taught and required him to submit at least one article related to current accounting/auditing practices to a peer-reviewed journal. He asked that Dr. Krug assist him in referring his workload dispute to a Faculty Review Committee under the CBA. However, Dr. Krug declined to do this because his workload dispute was based on his flawed FAP that did not comply with the CBA. CP 2064-2065.

On December 1, 2010, Dr. Doron was offered a contract for another probationary year on the condition that he agree to develop an improvement plan. CP 410. The offer advised Dr. Doron that he was required to develop an improvement plan by no later than the end of the first week of the Winter Quarter 2011. After receiving the December 1, 2010 offer, Dr. Doron refused to draft an improvement plan and refused to meet with the EWU administration to discuss a written improvement plan. CP 736-738. In an email dated January 5, 2011, Dr. Doron advised EWU that he would not participate in an improvement plan process. CP 412.

Dr. Doron requested that the UFE file a grievance over Dr. Fuller's recommendation that his reappointment to another year be conditioned on his agreement to develop an improvement plan based on a revised FAP.

Dr. Krug also declined to file such a grievance because it would have been based on his FAP that did not comply with the CBA. Moreover, EWU could require an improvement plan as a condition of reappointment under the CBA. Further the plan of improvement was consistent with the CBA which states that such a plan can be imposed if there are deficiencies in performance. Also, an improvement plan is not punitive but is designed to assist a faculty member in acquiring tenure. CP 2065.

On December 9, 2010, Dr. Krug met with Elizabeth Kissling, grievance chair for the UFE and Chris Kirby, chief steward for the UFE. They discussed Dr. Doron's issues and the various options available. They all agreed that the FAP was not consistent with the CBA and the AIS Department's policies and procedures for the reasons outlined above. It was their opinion that if Dr. Doron's FAP were redrafted so that it was compliant with the CBA there would be no need for an improvement plan. Moreover, in order for Dr. Doron to acquire tenure, he would need to address the issues raised in his evaluations including his teaching effectiveness and conducting research in contemporary as opposed to historical accounting practices. If the FAP was modified to address these concerns, he would have a better chance of getting tenure. Dr. Krug also felt that modifying the FAP to include a greater degree of specificity

would protect Dr. Doron by providing him with specific notice of what he would have to do to acquire tenure. CP 2065-2066.

In an email to Dr. Doron dated December 15, 2010 Dr. Krug encouraged him to renegotiate with his department chair a new FAP that was compliant with the CBA. He also stated that:

An FAP that clearly states the goals and objectives of your path to retention, tenure, and promotion would provide clear guidance to you and your colleagues. You have an opportunity to negotiate this in good faith with your colleagues. Such good faith negotiation would go a long way toward building cooperative relationships with colleagues which would immeasurably assist your career goals at EWU. CP 2066.

In an email dated February 9, 2011, Dr. Doron informed Dr. Krug that, “The university has terminated me effective June for not writing a new FAP. This is something the union will have to act on.” On or about February 7, 2011, Dr. Doron had actually been informed by Dr. Fuller that his employment would terminate as of June 15, 2011 because he had failed to prepare an improvement plan. CP 2066.

After Dr. Doron informed Dr. Krug that his employment would end at the end of the academic year, Dr. Krug consulted a number of faculty members regarding the likelihood of success of a grievance over the issue. Edward Byrnes, a faculty member and union steward whose opinion he highly respected, observed that Dr. Doron had been offered ample opportunity to engage in writing his improvement plan but had refused to

do so. Dr. Byrnes' opinion was that there were no grounds for grieving Dr. Doron's nonrenewal because the university was within its rights to terminate an employee who refused to accept his or her contract and the condition of an improvement plan was consistent with the CBA. Dr. Kissling also noted that Dr. Doron had numerous opportunities to comply with the university's request to develop an improvement plan. CP 2066-2067.

In an email dated February 16, 2011, Dr. Krug informed Dr. Doron that the UFE was requesting from the EWU administration all documents relevant to their decision and that they would review the documents for procedures of just cause, discipline, dismissal and related matters. Dr. Krug also requested from the administration all documents regarding how dismissals similar to Dr. Doron's had been handled over the past decade. After reviewing the documents the UFE requested, it was decided that a grievance over Dr. Doron's nonrenewal would not be successful because he had refused to agree to the terms of his reappointment by not agreeing to develop an improvement plan. CP 2067.

Gary McNeil was on the bargaining team that negotiated the CBA effective from October 8, 2009 through August 31, 2013. Section 5.3.1(b) of the CBA provides that if performance shortcomings are identified through the evaluation process, the probationary faculty member and the

department chair will create a plan of improvement. Under this section of the CBA, a faculty member cannot refuse to participate in the drafting of an improvement plan. CP 2057.

Mr. McNeil met with Dr. Doron on March 16, 2011 to discuss his nonrenewal with him. He told him that he did not accept the University's offer of employment for the 2011-2012 academic year because he did not agree to participate in the drafting of an improvement plan. He also told him that in order to try to get his job back, they would need to contact the EWU administration and inform them that he would be willing to agree to an improvement plan. Dr. Doron and Mr. McNeil then drafted an improvement plan proposal to present to the EWU administration. CP 2057.

After Dr. Doron and Mr. McNeil drafted the improvement plan proposal, Mr. McNeil presented it to Carol Hawkins, a human resources staff person, and Laurie Connelly, an assistant attorney general representing EWU. The next day he received an email informing him that EWU was proceeding with the nonrenewal of Dr. Doron's employment contract. CP 2058.

Dr. Doron admitted in his deposition that he received a conditional offer of reemployment for the 2011-2012 school year from EWU with the understanding that he develop an improvement plan. He also admitted

that he refused to agree to an improvement plan. Additionally, he admitted that he refused to accept EWU's conditional offer of reemployment. CP 2293-2295.

With regard to Dr. Doron's claim that the UFE discriminated against him, Dr. Doron stated the following during his deposition on August 10, 2012:

Q. I'm going to just change the focus for a second here. In your opinion, did the UFE discriminate against you on the basis of age, sex, marital status, race, creed, color, national origin, or because of any disability?

A. The first of several you mentioned, I have no basis for suspecting that. The last one, the disability thing, I was describing to Ms. Clemmons the issue with my mental state. I did not know at the time that Gary Krug was in the loop on that, but I have seen an e-mail - -not an e-mail - - I've seen in the discovery a note that Beth wrote to herself, that she had been in touch with Gary Krug about this and Gary Krug told her this is not a union issue. So, that's clear. He knew something about this. Whether that was motivating what he did, I have no way of knowing. CP 2072-2073.

Dr. Doron also admitted during his deposition that he would have had a better chance of obtaining tenure if he had negotiated an improvement plan and a FAP with the administration. CP 2076-2077.

After Dr. Doron's probationary contract was non-renewed, he refused to teach a class he was assigned to teach in the spring quarter of 2011. Instead of firing him, the administration decided to reduce his salary for refusing to teach the course. Mr. McNeil consulted with Dr. Kissling

about whether the UFE should file a grievance over the docking of Dr. Doron's pay. They decided that a grievance was not warranted because he refused to teach the class. CP 2271.

Dr. Doron stated during his deposition that he refused to teach Principals of Managerial Accounting, Accounting 252 in the spring quarter of 2011. He also stated that he was aware that he could be disciplined if he refused to teach the class and that he could be fired or his pay could be docked. Indeed, another professor advised him that he could be fired if he refused to teach a class. Finally, he stated that Accounting 252 was scheduled for 8:00 a.m., he usually walked his dogs at 8:00 a.m. and it would be stressful for him to teach a class at 8:00 a.m. CP 2288-2292.

Dr. Doron states that the Washington Education Association (WEA) and the United Faculty of Washington State (UFWS) encouraged and caused the UFE to declare his FAP to be flawed and indefensible. The decision to declare Dr. Doron's FAP to be flawed and indefensible was Dr. Krug's decision after he consulted with members of the UFE executive board including Elizabeth Kissling, Christopher Kirby, Dana Elder, Suzanna Milton and Edward Burns. The UFE executive board is the elected governing body of the UFE pursuant to the UFE's Constitution and Bylaws. The WEA and the UFWS did not encourage or cause Dr.

Krug to declare Dr. Doron's FAP to be flawed and indefensible through Gary McNeil or any other agent. CP 2272-2273.

RESPONSE TO PLAINTIFF'S STATEMENT OF THE CASE

Plaintiff states at page 5 of his opening brief that, "Djatej and Fuller agreed that Doron's academic research and dissertation in accounting history was a 'related field' for academic qualification purposes under the Association to Advance Collegiate Schools of Business ("AACSB"). In support of this statement, Plaintiff cites page 1423 of the record. Page 1423 of the clerk's papers is an excerpt from the deposition of Dr. Rex Fuller taken on October 11, 2012. Dr. Fuller stated during his deposition that for Plaintiff, "to be considered academically qualified, he would have to consider ways to publish in more direct areas of accounting, such as auditing and other fields that he was assigned to teach." CP 1423.

Plaintiff also states on page 5 that, "Fuller met with Djatej, Dowd and each member of the interview committee on an individual basis and agreed that Doron was academically qualified to teach accounting at EWU... However, Dr. Fuller stated during his deposition that Plaintiff would only have been initially academically qualified in his first year. CP 1428. He reiterated during his deposition that Plaintiff needed to "publish in accounting fields more directly related to teaching his fields, in addition to accounting history." CP 1428.

On page 11 of his brief, Plaintiff states that the DPC notes for the first time in its second annual performance review that Plaintiff needs to conduct research on topics other than accounting history. As noted above however, Dr. Fuller stated that Plaintiff's research in accounting history would only initially academically qualify him in his first year. Indeed, Dr. Murff feared that Plaintiff would lose his academically qualified faculty status. CP 402.

Plaintiff states on page 13 of his brief that he was not present at a meeting held on November 9, 2010 to discuss his concerns that EWU was asking him to perform research in areas other than those specified in his FAP. Dr. Krug attended the meeting and stated in his third declaration that Dr. Doron was present at the meeting as well. CP 2061.

On page 13 and 14 of his brief, Plaintiff states that he met with Murff and Djatej on two separate occasions in November of 2010 to discuss his proposal for an improvement plan and that his proposal included coauthoring research papers with Dr. Djatej. However, as previously mentioned, Dr. Doron informed EWU in an email dated January 5, 2011 that he would not participate in an improvement plan process. CP 412.

Plaintiff states on page 14 of his brief that during a meeting held on November 18, 2010 with him, Dr. Murff and Dr. Zimmerman, Dr. Krug stated that he "represents everyone in the room." In support of this,

Plaintiff cites Dr. Krug's deposition transcript. Dr. Krug actually stated the following during his deposition:

Q. Dr. Doron's e-mail dated November 18, 2010 to you he states: I also need to address your statement at the meeting last night that you said you're there to represent, quote, everyone's interest. Period. End Quote. Did you, in fact, say that or words to that effect.

A. I don't recall my exact wording. My statement was to the effect that the Chair and the DPC as well as Dr. Doron are members of the collective bargaining unit and as such my concern is with the collective bargaining unit and the contract. They're all covered.

Q. So you said words to the effect that you represent everyone in the room?

A. To the effect with the - - but in the context of the contract - - all of you in the bargaining unit. The contract covers Chairs and VPCs [sic] and this is germane because we do not grieve Chairs in DPCs because they're in the bargaining unit. We only grieve administration. So this has a great bearing on the kinds of discussions and sorts of actions that one takes when working with Chairs and DPCs as opposed to actions with the administration.

Q. So I'm trying to make sure I understand your answer. The UFE does represent department Chairs under the collective bargaining agreement. Is that your testimony?

A. Yes.

Q. And the UFE represents members of the Department of Personnel Committee under the collective bargaining agreement. Is that your understanding?

A. Yes.

Q. And so this meeting that you're attending on or about November 18, 2010, you see your role as representing everybody in that dispute?

A. I see my role as trying to resolve a problem in front of me and the most beneficial way for all concerned and for the contract. CP 1011-1012.

Plaintiff quotes portions of an email Dr. Krug wrote to Dr. Doron on November 21, 2010 on page 15 of his brief. He asserts that in the email, Dr. Krug stated, among other things, that “UFE cannot continue to represent you.” He then argues that Dr. Krug made this statement even though he understood that UFE’s duty of fair representation owed to Doron does not terminate if Doron does not follow UFE’s advice. Dr. Krug actually stated in the email the following:

I strongly advise against your taking unilateral action in your case. You are always free to conduct your own case if you so desire, but UFE cannot represent you once you begin to do so. Be further advised that the filing of a grievance is solely the decision of UFE based on our assessment of a case. CP 1058.

Dr. Doron states on page 15-16 of his brief that, “Krug understood that Doron had requested the UFE to file a grievance because Murff’s demands that Doron agree to an improvement plan which changed his academic research expectations unilaterally modified Doron’s FAP, which contravenes the terms of the CBA.” In support of this statement, Doron does not cite Dr. Krug’s deposition or any other statement allegedly made by him. He only cites the provisions of the collective bargaining agreement he is referring to on pages 242-243 of the clerk’s papers.

On page 17 of his brief, Plaintiff states that in an email sent to Mr. McNeil dated November 22, 2010, Dr. Krug stated that it was the opinion of the UFE that Dr. Doron's FAP was not in compliance with the CBA.

Dr. Krug also stated the following in the email:

It is the opinion of UFE that the Faculty Activity Plan for Michael Doron, dated November 20, 2009 is flawed, indefensibly vague and not in compliance with the requirements for an FAP stated in the Collective Bargaining Agreement in effect 2009-2013. In particular the document is not in compliance with Article 7.3.1 and subheadings of that article.

7.3.1 Plan Content. The FAP shall be consistent with the University mission and Strategic Plan, college, library, and department strategic plans, P&P, and the Agreement. The FAP shall include all areas of professional activity, development, and expected performance; describe an equitable workload; and include any other expectations as required by department or college/library P&P. Where the FAP is intended to lead to tenure and/or promotion the plan shall so state.

Doron's FAP does not state that it is intended to lead to tenure and promotion.

Doron's FAP is not consistent with the college P&P.

Doron's FAP presents assessment criteria that cannot be measured and/or that do not include metrics of measurement from the college P&P.

We do not hold this list to be exhaustive or complete.

UFE proposes that either the Chair of ACIS or Dr. Doron request a new FAP to be negotiated as is set forth in the CBA 7.3.5. This process should be completed by the end of Winter Quarter.

UFE is prepared to supply all parties with a sample of an FAP that meets the requirements given in the CBA.

Plaintiff states on page 20 of its brief that, “Krug warned EWU administration that if EWU changed Doron’s FAP without Doron’s consent, the UFE will file a grievance.” Plaintiff references pages 803, 804 and 809-812 of the clerk’s papers in support of his assertion that Dr. Krug made this statement. However, this statement is not contained anywhere in the record.

On page 19 of its brief, Plaintiff states that Dr. Krug refused to file a grievance on behalf of Dr. Doron after Murff unilaterally changed Doron’s Workload Plan and class schedule without proper notice pursuant to the CBA. Disputes regarding workload plans are not subject to the grievance procedure. Section 7.5.6 of the CBA in effect at the time provided that workload disputes would be referred to a Faculty Review Committee and the Chief Academic officer. Under section 7.5.6(a)(v), the Chief Academic Officer’s determination regarding a work load dispute shall be final and binding and may not be challenged through the grievance procedure. CP 257-258. Plaintiff also states that Dr. Krug refused to refer Dr. Doron’s workload dispute to the Faculty Review Committee because it would be a waste of time. Dr. Krug stated during his deposition that because Dr. Doron’s Faculty Activity Plan was fatally flawed, it would be a waste of time to refer the matter to the Faculty Review Committee and

would not lead to a satisfactory resolution of the issue. CP 1025. Dr. Krug also determined that Dr. Murff's request to modify Dr. Doron's workplan by having him teach Accounting 252 was not unreasonable because it was made to assist him in acquiring the skills to teach accounting in the MBA program. Faculty members who had administered the program had complained that Dr. Doron's teaching in his MBA classes was deficient. CB 2701.

On pages 21-22 of his brief, Plaintiff states that he agreed to teach Accounting 252 after Dr. Zimmerman informed him that he would be required to teach the class and that if he refused to do so he would be disciplined. Dr. Doron stated during his deposition that he refused to teach Accounting 252 in the spring quarter of 2011. He also stated that he was aware he could be disciplined if he refused to teach the class and that he could be fired or his pay could be docked. Indeed, another professor advised him that he could be fired if he refused to teach the class. Finally, he stated that Accounting 252 was scheduled for 8:00 a.m., he usually walked his dogs at 8:00 a.m. and it would be stressful for him to teach a class at 8:00 a.m. CP 2288-2292.

Plaintiff states on page 22 that in an email dated January 12, 2011, Dr. Krug stated that the UFE found nothing to grieve in his case with the exception of the FAP itself and that there was no action for the UFE to

take. The UFE arrived at this conclusion only after careful consideration of the facts and circumstances. Dr. Krug stated the following in his email to Dr. Doron dated January 12, 2011:

Several members of UFE executive board have met and reviewed your case on multiple occasions. We have also consulted with EWU administration regarding your case, and we have considered all communications from you.

UFE has been clear that the central document in your contract, your FAP, is deeply flawed. UFE has found nothing to grieve in your case with the exception of the FAP itself, and as neither you nor administration have expressed any interest in this solution, there is not action for UFE to take.

We have encouraged you to develop a compliant FAP that would clearly define the conditions of your employment. You have declined to take this advice and have followed your own counsel. UFE cannot advise you on actions that you take contrary to our recommendations.

Throughout, UFE has acted in what we believe is your best interest and the best interest of the CBA. CP 1084-1085.

On page 25 of Plaintiff's brief it is stated that Dr. Krug never asked Dr. Doron whether Dr. Doron had met with Dr. Murff and Djatej to discuss an improvement plan for Dr. Doron. There is no evidence in the record that Dr. Doron ever met with anyone to discuss an improvement plan, that he informed anyone that he had met with certain individuals to discuss an improvement plan or that he denied the allegations in Dr. Fuller's memo dated February 7, 2011. The evidence does show, as stated previously, that Dr. Doron refused to discuss or agree to an

improvement plan. It should also be noted that Dr. Krug never discussed the memo dated February 7, 2011 with Dr. Doron because at the time the letter was written, Gary McNeil and Dr. Kissling were representing Dr. Doron. Additionally, Dr. Krug never asked Dr. Doron whether he had met with Dr. Murff or Dr. Djatej to discuss an improvement plan because Dr. Doron made it clear to him on a number of occasions in writing and during phone conversations that he had no intention of discussing or agreeing to an improvement plan. CP 2701.

ARGUMENT

1. Standard of Review.

The standard of review of an order of summary judgment is de novo. The appellate court performs the same inquiry as the trial court. The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. The court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Jones v. Allstate Insurance Company*, 146 Wn. 2d 291 (2002).

It should be noted that pursuant to RAP 10.1(g), Respondents UFE, UFWS and WEA adopt by reference the section of EWU's brief addressing Assignment of Error 1 on page 1-2 of Plaintiff's brief.

2. The UFE did not breach its duty of fair representation.

The Plaintiff argues that the UFE breached its duty of fair representation by its actions and omissions. A union breaches its duty of fair representation when its conduct is discriminatory, arbitrary or in bad faith. *Muir v. Council 2, Washington State Council of County and City Employees and Local 1849, AFSCME, AFL-CIO*, 154 Wn.App. 528, 531 (2010). In *Cavanaugh v. Southern California Permanente Medical Group, Inc.*, 583 F. Supp. 2d 1109, 1128-1129 (C.D. Cal. 2008), the court held:

[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' ...as to be irrational.

Because the union must balance many collective and individual interests when it decides whether and to what extent to pursue a particular grievance, courts should accord substantial deference to the union's decisions...This deferential standard for arbitrary conduct gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong.

...so long as a union exercises its judgment, no matter how mistakenly, it will not be deemed to be wholly irrational. *Id* at 1128-1129.

In *Lindsey v. Municipality of Metropolitan Seattle*, 49 Wn.App. 145 (1987), the court also held that, "courts should 'accord substantial deference' to a union's decisions regarding grievance processing because

a union must balance many collective and individual interests in making these decisions.” *Id* at 149. Additionally, the court noted that, a union satisfies its duty of fair representation if it conducts at least a minimal investigation into the merits of a grievance. Only an egregious disregard for union member’s rights constitutes a breach of the union’s duty. *Id* at 150. The court also held that it has never been determined that a union acted in an arbitrary manner where the challenged conduct involved the union’s judgment as to how best to handle a grievance. A union’s error in evaluating the merits of a grievance is not arbitrary conduct. *Id* at 151. In accordance with the broad discretion traditionally owed to unions, courts do not scrutinize the quality of the union’s decision. *Muir*, 154 Wn. App. at 533.

In this case, the decision not to pursue grievances on behalf of Dr. Doron was far from arbitrary and only made after careful consideration of the circumstances of his case. Dr. Krug, the UFE President at the time, had numerous discussions in person and by email with Dr. Doron. He also met with faculty members and representatives of the EWU administration in an effort to negotiate a resolution and sought the input and advice from officers of the UFE. He determined that a new FAP that comported with the CBA and provided Dr. Doron with specific notice of what he needed to do to acquire tenure would increase his chances to obtain tenure. In an

email dated December 15, 2012 referred to above, Dr. Krug advised Dr. Doron that a FAP providing him with clear guidance and the good faith negotiation of such a FAP would “immeasurably assist him in his career goals at EWU.” CP 2066. Dr. Doron admitted during his deposition that he would have had a better chance of obtaining tenure if he had negotiated a new FAP and a plan of improvement with the administration. CP 2076-2077. Dr. Krug declined to file the grievances Dr. Doron requested because they would have been based on his original FAP that was defective and that did not comply with the CBA and the policies and procedures of his department. Moreover, the UFE had an interest in insuring that all faculty members had FAPs that comported with the CBA and departmental policies. CP 2064. A decision was also made not to file a grievance over Dr. Doron’s nonrenewal because he had rejected the terms of his reappointment by not agreeing to develop an improvement plan. Moreover, Dr. Doron admitted that he refused to accept the conditional offer of reemployment for the 2011-2012 school year by not agreeing to develop an improvement plan. CP 2293-2295.

Because the decisions not to file grievances on Dr. Doron’s behalf were made only after extensive investigation of the circumstances of Dr. Doron’s case and only after careful consideration and consultation with numerous members of the faculty and administration, the decisions were

not arbitrary. Moreover, the actions of the UFE were entirely reasonable and not irrational. Because the UFE had a rational basis for its decisions, its actions were not arbitrary. *Schmidtke v. Tacoma School District*, 69 Wn. App. 174, 181 (1993).

To establish that the exercise of judgment by a union was discriminatory, a plaintiff must provide substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives. *Cavanaugh*, 583 F. Supp.2d at 1130. Discrimination can also be established by evidence that persons under similar situations with similar grievances were given representation. *Schmidtke*, 69 Wn. App. at 181. There is no evidence Dr. Doron was subjected to intentional and severe discrimination. Indeed, he admitted during his deposition that he had not been discriminated against by the UFE for membership in a protected class. CP 2072-2073. Although he stated that he suspected that Dr. Krug may have been aware of his “mental state”, he stated he had no way of knowing whether that was motivating what Dr. Krug did or did not do. CP 2073. There is also no evidence that the UFE pursued grievances on behalf of similarly situated faculty members but not Dr. Doron. In sum, there is no evidence that the decision of the UFE to not file grievances was discriminatory.

A union acts in bad faith when it acts with an improper intent, purpose or motive encompassing fraud, dishonesty and other intentionally misleading conduct. *Merritt v. International Association of Machinists and Aerospace Workers*, 613 F. 3d 609, 619 (CA 6th 2010). The UFE's decision not to file grievances based on a defective FAP was in Dr. Doron's best interests. Dr. Krug was attempting to assist Dr. Doron in obtaining tenure by negotiating a FAP that comported with the CBA and provided him with specific notice of what he needed to do to obtain tenure. Dr. Doron himself admitted that it was more likely EWU would have granted him tenure had he negotiated another FAP. CP 2076-2077. Moreover, the UFE's decision not to grieve his nonrenewal was based on the fact that Dr. Doron had rejected his reappointment by not agreeing to draft an improvement plan. CP 2067. There is no evidence that the decisions of the UFE were the result of an improper motive or were fraudulent, dishonest and intentionally misleading. Therefore, the actions of the UFE with regard to Mr. Doron were not in bad faith.

The Plaintiff argues that the UFE had an irrational basis for refusing to process Doron's repeated requests for grievances. However, Plaintiff fails to point to any evidence to show that the UFE's reasons for its decisions were so far outside a wide range of reasonableness as to be irrational. Instead, Plaintiff argues that because he disagreed with the UFE's

approach to his employment issues, the UFE acted irrationally. If this were the standard to determine whether a union acted irrationally, whenever a union refused to process a grievance, a union member could sue the union on the basis that he or she disagreed with the union's judgment. Accordingly, to avoid liability, unions would have to file grievances and pursue those grievances to arbitration if a member requested that one be filed irrespective of their merit. To avoid this absurd result, courts have held that unions "need not arbitrate every case. Unions may screen grievances and process those which they determine to have merit." *Lindsey*, 49 Wn. App. at 149. Moreover, in *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985), the court noted that, "we have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance... More specifically, a union's error in evaluating the merits of a grievance is not arbitrary conduct."

Plaintiff criticizes the UFE for declaring Dr. Doron's FAP to be invalid and argues that the UFE's actions were "inherently" in bad faith without providing any evidence to indicate that the UFE acted in bad faith. Moreover, as stated previously, there were several reasons why it was the position of the UFE that Dr. Doron's FAP should be revised. First, it did not comport with the collective bargaining agreement and the policies and

procedures of the AIS department. Second, it was extremely vague making assessment of whether the FAP was adequately complied with difficult if not impossible. Third, the UFE had an interest in ensuring that FAPs for all faculty members complied with the collective bargaining agreement it had negotiated with EWU. Finally, modifying Dr. Doron's FAP would allow him to address the issues raised in his evaluations so that he would have a better chance of obtaining tenure. Plaintiff also argues that no language in the collective bargaining agreement expressly or impliedly allowed the UFE to take the position that the FAP of a faculty member should be modified. However, Plaintiff has failed to cite any authority for the proposition that a union needs authorization in a collective bargaining agreement to exercise its judgment as to the best approach and resolution of a bargaining unit member's issue in the workplace.

Plaintiff argues that the UFE should have forwarded Dr. Doron's workload plan dispute to the FRC. Dr. Krug determined that Dr. Murff's decision to have Dr. Doron teach accounting 252 was reasonable and would have assisted him in acquiring the skills to teach accounting in the MBA program. Moreover, because the dispute would have been based on Dr. Doron's non-complaint FAP, it was decided to not refer the dispute to the FRC. CP 2064-2065; CP 2701.

3. The WEA and the UFWS did not tortuously interfere with any contracts or business expectancies of Dr. Doron.

The Plaintiff asserts that the WEA and the UFWS through their state organizer Gary McNeil, intentionally interfered with the business relationship between Dr. Doron and EWU by causing the UFE to declare that Doron's FAP was flawed and indefensible thereby allowing EWU to terminate Doron's probationary contract without cause. These claims rest entirely on the theory and supposition that Mr. McNeil advised and encouraged the UFE to declare Dr. Doron's FAP to be flawed and indefensible. However, Gary Krug determined that Dr. Doron's FAP was flawed. He made that decision after consulting with the UFE executive board. CP 2272-2273. Therefore, this claim is wholly without merit because the facts in support of the claim do not exist.

There is also no other evidence that Mr. McNeil or any other agent of the WEA or the UFWS interfered with Dr. Doron's business expectancies or contracts. A party claiming tortious interference with a contractual relationship or business expectancy must prove five elements: 1) the existence of a valid contractual relationship or business expectancy; 2) that defendants had knowledge of that relationship; 3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; 4) that defendants interfered for an improper purpose or

used improper means; and 5) resultant damage. *Pacific Northwest Shooting Park Association v. City of Sequim*, 158 Wn. 2d 342, 351 (2006). Liability for tortious interference cannot be predicated on speculation, conjecture or guesswork and no fact essential to the claim can be inferred absent a substantial evidentiary basis. 44B Am. Jur. 2d, Interference, §57. Plaintiff has failed to prove any of the above elements because he has failed to show that Mr. McNeil or any other individual associated with the WEA or UFWS did anything to interfere with Dr. Doron's business expectancies or contracts. Indeed, the only contact that Mr. McNeil had with Dr. Doron was the meeting he had with him on March 16, 2011. At the meeting he drafted an improvement plan for him in an attempt to get his job back. Mr. McNeil attempted to maintain the contractual relationship Dr. Doron had had with EWU, not interfere with it.

As stated previously, the Plaintiff argues that the actions of Mr. McNeil in encouraging the UFE to declare Dr. Doron's FAP to be flawed and indefensible resulted in the termination of Dr. Doron's probationary contract and caused EWU to violate the collective bargaining agreement in connection with his employment. Dr. Doron gave the following responses to questions asked during his deposition:

Q. Did any of the actions of the WEA or UFWS contribute to or cause the university to terminate your employment.

A. As I said, the only direct contact I had with anyone outside of the UFE was that one meeting with Gary McNeil. As far as what he was advising, how he was involved in the UFE's decision-making process, I'm not in a position to tell you that.

Q. Are you aware of anything that Gary McNeil did to attempt to get the university to violate the collective bargaining agreement with regard to your employment.

A. As I said, I have very limited dealings with Gary McNeil. I do not have certain knowledge that he did anything to encourage the university to violate the collective bargaining agreement. CP 2285-2286.

It is apparent from the above that there is no evidence that Mr. McNeil did anything to cause EWU to terminate Dr. Doron or violate the collective bargaining agreement.

Plaintiff lists a number of contacts that Mr. McNeil had with Dr. Krug regarding Dr. Doron's employment issues at pages 37 and 38 of its brief and then concludes, without more, that Mr. McNeil "encouraged and caused UFE President Krug to declare Doron's FAP flawed and unenforceable." Assuming for the sake of argument that this statement is true, Plaintiff fails to show how this action resulted in the termination of Dr. Doron's employment. It is clear from the record that Dr. Doron rejected EWU's offer of employment by failing to agree to an improvement plan. Dr. Doron's employment ended because of his own

conduct, not the conduct of Mr. McNeil; a fact that Dr. Doron has admitted.

The third and fourth element of a claim for tortious interference with a contractual relationship or business expectancy requires the plaintiff to show that the defendant's intentional interference induced or caused a breach or termination of the relationship or expectancy and that Defendants interfered for an improper purpose. *Pacific Northwest Shooting Park Association*, 158 Wn. 2d at 351. Plaintiff has not shown that the actions of Mr. McNeil were motivated to any degree by an intent to interfere with Dr. Doron's contractual or business expectancies with EWU. Indeed, the evidence shows that Mr. McNeil was attempting to get Dr. Doron's job back by negotiating an improvement plan with EWU. There is no evidence that Mr. McNeil's conduct was motivated to any degree by an intent to get EWU to terminate Dr. Doron.

Plaintiff also argues that Mr. McNeil's alleged actions in encouraging Dr. Krug to declare Dr. Doron's FAP to be unenforceable and in encouraging the UFE to breach its duty of fair representation amount to intentional interference with a business expectancy. There is no evidence that Mr. McNeil engaged in this conduct. Moreover, assuming that he did, the conduct would not amount to tortious interference with a contractual relationship or business expectancy. As stated previously, the third

element of a claim for tortious interference requires a showing that the intentional interference caused a breach or termination of contractual relationship or business expectancy. *Pacific Northwest Shooting Park Association*, 158 Wn.2d at 351. A valid business expectancy is any prospective contractual or business relationship that would be of pecuniary value. *Newton Insurance Agency and Brokerage, Inc. v. Caledonian Insurance Group, Inc.*, 114 Wn. App. 151,158 (2002). Merely stating that an FAP is flawed and unenforceable without showing that taking such a position resulted in the termination of Dr. Doron's employment does not amount to a breach or termination of a contractual relationship. Plaintiff also argues that Mr. McNeil encouraged the UFE to breach its duty of fair representation, resulting in the termination of Dr. Doron's contractual relationship with EWU. However, Plaintiff has not shown that the UFE breached its duty of fair representation. Moreover, assuming that the UFE did, Plaintiff has not shown that the alleged breach ended Dr. Doron's employment. Dr. Doron's employment ended because he continually refused to agree to an improvement plan, a condition of his reappointment. CP 853-854.

On page 38 of its brief, Plaintiff states that in an email dated February 11, 2011 from Mr. McNeil to Dr. Krug, Mr. McNeil stated that, "[Doron's] termination is a stretch. We could grieve progressive

discipline...if there is an evaluation process and shortcomings are identified, then there has to be an improvement plan. Not a rubber stamp or forced...The union does not have to file a grievance.” The full text of the quoted portion of the email is as follows:

Some initial observations

1. Termination is a stretch. We could grieve progressive discipline. The remedy would probably have to include an improvement plan.
2. Will is not an opt-out word. Unless I am missing something, if there is an evaluation process and shortcomings are identified, then there has to be an improvement plan. Not a rubber stamp or forced.
3. The union does not have to file a grievance. We have to deliberate the case, not decide anything on personalities.

So, we should talk about this one next week too. CP 1092-1093.

Mr. McNeil also noted in the email that: 1) a probationary faculty member is required to develop an improvement plan under section 5.3.1b of the collective bargaining agreement; 2) Doron was notified about the requirement by the Department Personnel Committee, the department chair and dean and the Provost; 3) Doron wrote a response on January 5, 2011 saying that he will not participate in the process and will not agree to any changes to his FAP; 4) Doron had another opportunity to prepare an improvement plan; and 4) Dr. Fuller is terminating Dr. Doron's employment based on Doron's own actions in not meeting the conditions of his employment. CP 1092.

Mr. McNeil's purpose in sending the email dated February 11, 2011 was to outline the various issues associated with Dr. Fuller's memo to Dr. Doron dated February 7, 2011. The email only contained Mr. McNeil's initial impressions of Dr. Fuller's letter. Although he stated that termination was a stretch, he later determined that Dr. Doron had refused to accept the offer of reappointment EWU made to him because he refused to agree to participate in the development of an improvement plan. Therefore, he had not been terminated and a grievance was not warranted because he had refused to accept EWU's offer of employment. CP 2695.

On page 39 of its brief, the Plaintiff states that Mr. McNeil's advice to Dr. Krug interfered with Dr. Doron's business expectancies with his union and thereby his employer. As stated previously, a valid business expectancy is any prospective contractual or business relationship that would be of pecuniary value. *Newton Insurance Agency and Brokerage, Inc.*, 114 Wn. App. at 158. Plaintiff has not shown that Dr. Doron would gain anything of pecuniary value from his relationship with the UFE. Therefore, he does not have a business expectancy with the UFE.

4. Plaintiff is not entitled to an award of attorney's fees under RCW 49.48.030 and RAP 18.1.

RCW 49.48.030 provides the following:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable

attorney's fees, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

Plaintiff did not obtain a judgment for salary or wages allegedly owed to him and is therefore not entitled to an award of attorney's fees under the express provisions of the statute should he prevail on his appeal. He would have to seek such an award on remand to the superior court. Plaintiff cites *Mega v. Whitworth College*, 138 Wn. App. 661 (2007) in support of his argument that he is entitled to attorney's fees under RCW 49.48.030. However, in that case the plaintiff did obtain a judgment for the wages owed to him.

Plaintiff also claims that he is entitled to attorney's fees under RAP 18.1. However, RAP 18.1 allows such an award "If applicable law grants to a party the right to recover reasonable attorney's fees or expenses on review before either the Court of Appeals or Supreme Court..." Plaintiff has not cited any provision of law that authorizes an award of attorney's fees on review.

CONCLUSION

For the reasons set forth in this brief the decision of the superior court should be affirmed.

DATED this 23rd day of October, 2013.



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of Brief of Respondents United Faculty of Eastern Washington, United Faculty of Washington State and the Washington Education Association by legal messenger service to the below named parties of record to this proceeding:

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JENIFER PETERSEN