P.E.R.C. NO. 91-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN BOROUGH BOARD OF EDUCATION, RICHARD MARTONE and ROGER ZIEGLER,

Charging Parties,

Docket No. CE-H-90-11

-and-

FRANKLIN EDUCATION ASSOCIATION, NATIONAL EDUCATION ASSOCIATION, and NEW JERSEY EDUCATION ASSOCIATION,

Respondents.

FRANKLIN EDUCATION ASSOCIATION, and NATIONAL EDUCATION ASSOCIATION,

Charging Parties,

Docket No. CO-H-90-256

-and-

FRANKLIN BOROUGH BOARD OF EDUCATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that the Franklin Education Association and the National Education Association violated the New Jersey Employer-Employee Relations Act by invoking NEA by-law 2-3.d. against Franklin Board members and expelling them from the NEA and its affiliates because they negotiated on behalf of a school board.

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FRANKLIN BOROUGH BOARD OF EDUCATION,

Respondent.

Appearances:

For Richard Martone, Roger Ziegler and the Board; DeMaria, Ellis, Hunt & Salsberg, attorneys (Richard H. Bauch, of counsel)

For the Associations; Bredhoff & Kaiser, attorneys (Robert H. Chanin and Glenn Fine, attorneys)

DECISION AND ORDER

On February 1, 1990, the Franklin Borough Board of Education filed an unfair practice charge against the Franklin Education Association ("FEA") and the National Education Association ("NEA") (CE-H-90-11). The charge alleges that the FEA and NEA violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(b)(2),[1/] by invoking NEA bylaw 2-3.d. to expel Franklin Board members Richard Martone and Roger Ziegler from the NEA because they participated on the Board's negotiating team during negotiations with the FEA.

On March 13, 1990, the FEA and NEA filed an unfair practice charge against the Board (CO-H-90-256). That charge alleges that the Board violated subsections 5.4(a)(1) and (2)[2/] by filing its unfair practice charge against the FEA and NEA.

On July 11, 1990, the Board amended CE-H-90-11 to add Richard Martone and Roger Ziegler as charging parties and the New Jersey Education Association ("NJEA") as a respondent. The amendment alleges that the Associations' actions against Martone and

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1/ This subsection prohibits employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances."

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization."

Ziegler violated subsection 5.4(b)(1).[3/] It further alleges that the FEA is refusing to negotiate in good faith with the Board in violation of subsection 5.4(b)(3).[4/]

On October 24, 1990, a consolidated Complaint and Notice of Hearing issued. On November 14 and 16, respectively, the Board and Associations filed Answers denying that they had violated the Act.

On March 1, 1991, the Board moved for partial summary judgment on its original allegations[5/] and on the NEA and FEA charge.

On March 4, 1991, the FEA and NEA moved for summary judgment on its charge. The parties have filed replies.

The NEA operates through a network of affiliates in local school districts. The FEA is the majority representative of certain employees of the Franklin Borough Board of Education.

Richard Martone and Roger Ziegler are elected members of the Franklin Board and were members of the Board's negotiating team during negotiations with the FEA for the 1989-92 contract. They

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3/ This subsection prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

4/ This subsection prohibits employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

5/ That allegation is now Count 1 of its amended unfair practice charge.

also served on the Board's negotiating teams during negotiations with the FEA for the 1985-1987 and 1987-1989 agreements. Martone is a teaching staff member of the Randolph Public School District and was a member of the NEA, NJEA, and the Randolph Education Association. Ziegler is a teaching staff member in the Hopatcong Borough School District and was a member of the NEA, NJEA, and the Hopatcong Education Association.

The NEA does not exclude supervisors from membership. However, in 1975, the NEA adopted Bylaw 2-3.d. It provided:

> An individual who is a member of a negotiating team representing a school board or representing a board of trustees of a higher education institution shall be denied membership.

In 1982, the bylaw was amended and now provides:

> An individual who is a member of a negotiating team representing a school board or representing a board of trustees of a higher education institution shall be denied membership if such denial is requested by a governing body of an association affiliate in the school district or higher education institution in question. The executive committee shall adopt rules for implementing this Bylaw.

NEA executive committee rules, adopted in September 1982 and amended in March 1990, provide that the requested ineligibility or suspension shall continue for as long as the individual is a member of the negotiating team or the duration of the agreement that was negotiated, whichever is longer.

The negotiations between the FEA and the Board that precipitated this dispute concluded on October 26, 1989 when a tentative agreement was reached. On November 2, the FEA voted to

invoke NEA Bylaw 2-3.d. against Martone and Ziegler. On November 20, the FEA sent a letter to the NEA asking it to deny them membership.

Martone and Ziegler were accorded all procedural rights, including an appeal to the executive committee. On May 16, 1990, they were denied membership in the NEA, and pursuant to NEA Bylaws 8-7(g) and 8-11(g),[6/] they were subsequently denied membership in the NJEA and the Randolph and Hopatcong Education Associations.

N.J.A.C. 19:14-4.8(d) provides that summary judgment may be granted:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law.

All inferences of doubt are drawn against the movant in favor of the opponent of the motion. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 77-75 (1954).

We begin with the Board's motion in CE-H-90-11. We recognize that employee organizations are free to create rules binding on their members to accomplish organizational objectives. These rules, often in the form of constitutions and by-laws, are part of the contract between the organization and its members. Calabrese v. PBA Local No. 76, 157 N.J. Super. 139 (Law Div. 1978);

6/ Those bylaws provide that local and state affiliates shall deny membership to an individual while that individual is denied membership in the NEA pursuant to Bylaw 2-3.d.

FOP Lodge No. 12, P.E.R.C No. 90-65, 16 NJPER 126 (¶21049 1990). We further recognize that a union may expel discordant elements in order that harmony may prevail. Calabrese. But a union's internal rule may not invade or frustrate an overriding policy of the labor laws. See West New York Police Supervisors Ass'n, P.E.R.C. No. 89-60, 15 NJPER 21 (¶20007 1988), aff'd 235 N.J. Super. 123 (App. Div. 1989).

N.J.S.A. 34:13A-5.4(b)(2) articulates such a policy. It prohibits an employee organization from interfering with, restraining or coercing a public employer in the selection of its representative for the purposes of negotiations or the adjustment of grievances.

We have not before been called upon to decide whether the expulsion of a union member for participating on an employer's negotiations committee violates subsection 5.4(b)(2). Therefore, it is appropriate to resort to federal cases interpreting section 8(b)(1)(B)[7/] of the National Labor Relations Act, 29 U.S.C. §151 et seq., the private sector counterpart to our Act, as an aid in interpreting our Act. See In re Bridgewater Tp., 95 N.J. 235, 240-41 (1984).

7/ This subsection provides that it shall be an unfair labor practice for a labor organization or its agents to restrain or coerce an employer in the selection of its representative for the purposes of collective bargaining or the adjustment of grievances.

In Florida Power & Light Co. v. IBEW Local 641, 417 U.S. 790 (1974), the Court held that a union does not violate section 8(b)(1)(B) by disciplining its supervisor-members for performing rank-and-file bargaining unit work during a lawful strike. Reviewing applicable legislative history, the Court found it:

> [i]nescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of Section 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.8/ [Id. at 804]

Applying the Florida standard, the Court later held that a union violates section 8(b)(1)(B) by threatening and disciplining union members who cross picket lines to perform their normal supervisory functions which include adjusting grievances. American Broadcasting Companies, Inc. v. Writers Guild of America, West, Inc., 437 U.S. 411 (1978).

This does not mean that a union can never expel supervisor-members with grievance or negotiations responsibilities. In National Ass'n of Letter Carriers, AFL-CIO and U.S. Postal Service, 240 NLRB No. 68, 100 LRRM 1315 (1979), the National Labor Relations Board considered a union rule providing that any union member temporarily or permanently promoted to a supervisory position

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8/ The Court rejected the National Labor Relations Board's position that section 8(b)(1)(B) encompasses "any situation in which the union's actions are likely to deprive the employer of the undivided loyalty of his supervisory employees." Id. at 806.

within the postal service would not be eligible to continue membership in the union. The Board concluded that such a disciplinary rule did not violate section 8(b)(1)(B). While the rule might result in a smaller pool of letter carriers willing to serve as temporary supervisors, the postal service can still determine which letter carriers within that pool will serve as temporary supervisors. In addition, the Board noted that if temporary supervisors are no longer members of the union, it is impossible to discipline or penalize them for actions which they may take while serving as a supervisor. Thus, the possibility that the union will be able to influence temporary supervisors in performing their 8(b)(1)(B) responsibilities is almost negligible.[9/]

The NEA's bylaw varies significantly from the kind of rule permitted in Postal Service. That rule barred from membership all who accepted supervisory positions. The NEA's current bylaw is not a uniform rule. Unlike the NEA's prior bylaw, it does not bar membership to all who are members of board negotiating teams.[10/] Instead, the current bylaw gives the governing body of any affiliates the discretion to request that members of their school

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9/ The Court distinguished a union rule which, contrary to the collective bargaining agreement and the parties' practice, prohibited its members from accepting positions as temporary supervisors. System Counsel T-6, IBEW, AFL-CIO, CLC, 236 NLRB No. 143, 98 LRRM 1497 (1978); CWA Local 1122, 226 NLRB No. 97, 93 LRRM 1161 (1976).

10/ We need not consider the legality of a uniform rule similar to the pre-1982 NEA bylaw.

boards' negotiating teams be denied membership in the Associations. Such discretion could be used to penalize board members whose actions are not perceived to be in accord with a local affiliate's negotiations interests. Also, the threat of expulsion could influence a union member's decisions while negotiating on behalf of a board. Such influence affects a board's statutory right to select its negotiations representative without union interference. Balancing the Association's right to set its own membership conditions against that statutory right, we find that the Board's interest predominates.[11/]

Accordingly, we grant the Board summary judgment in CE-H-90-11.[12/] By so doing, we have recognized the Board's right to enforce its statutory rights through an unfair practice proceeding. We therefore dismiss the allegations in CO-H-90-256 that the Board committed an unfair practice by filing its charge. The motion and cross-motion for summary judgment in CO-H-90-256 also ask us to judge the propriety of the Board's attempt to vindicate its right by representing Martone and Ziegler in the NEA's internal

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11/ The Association's reliance on NLRB v. IBEW, Local 340, 481 U.S. 573, 125 LRRM 2305 (1987) is misplaced. That case emphasized that section 8(b)(1)(B) was not intended to "prevent enforcement of uniform union rules that may occasionally have the incidental effect of making a supervisory position less desirable." 125 LRRM at 2312 (emphasis supplied).

12/ Although Counts 2 and 3 of CE-H-90-11 were not the subject of these motions, no further relief would appear to be available. We expect that those allegations will be withdrawn.

appeal proceedings. Under all the circumstances of this case, we find that this attempt did not violate the Act. In particular, we note the Board attorney's initial disclosure that his firm represented Martone and Ziegler as well as the interests of the Board, and the NEA's acquiescence to that representation, specifically its invitation to the firm to argue Martone and Ziegler's case before the NEA's Executive Committee. We therefore grant summary judgment for the Board in CO-H-90-256.

ORDER

The Franklin Education Association and the National Education Association are ordered to:

A. Cease and desist from interfering with, restraining or coercing a public employer in the selection of its representative for the purposes of negotiations or the adjustment of grievances, particularly by invoking NEA bylaw 2-3.d. against school board members and expelling them from the NEA and its affiliates because they negotiated on behalf of a school board.

B. Restore the NEA and affiliate memberships of Richard Martone and Roger Ziegler.

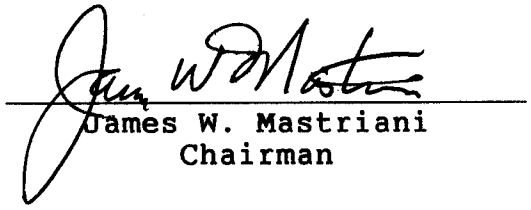
C. Post in all places where notices to unit members are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondents' authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

D. Notify the Chairman of the Commission within twenty (20) days of receipt what steps they have taken to comply with the order.

CO-H-90-256 is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: May 21, 1991
Trenton, New Jersey
ISSUED: May 21, 1991

Chairman Mastriani, Commissioners Johnson, Goetting and Wenzler voted in favor of this decision. Commissioner Smith abstained. Commissioners Regan and Bertolino abstained from consideration.

NOTICE TO EMPLOYEES

REPRESENTED BY THE

FRANKLIN EDUCATION ASSOCIATION

an affiliate of the

NATIONAL EDUCATION ASSOCIATION

PURSUANT TO

An Order of the

PUBLIC EMPLOYMENT RELATIONS COMMISSION

And in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT

As amended,

We, hereby notify unit employees that:

We will cease and desist from interfering with, restaining or coercing a public employer in the selection of its representative for the purposes of negotiations or the adjustment of grievances, particularly by invoking NEA Bylaw 2-3.d against school board members and expelling them from the NEA and its affiliates because they negotiated on behalf of a school board.

We will restore the NEA and affiliate memberships of Richard Martone and Roger Ziegler.

Docket No. CE-H-90-11

Dated: _____ By : _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"