GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
Council of School Officers, Local 4, AFSA, AFL-CIO, Complainant,	PERB Case No. 90-U-08 Opinion No. 256
v.	
Council of School Officers, Respondent.	

DECISION AND ORDER [1]/

On February 2, 1990, Council of School Officers, Local 4, AFSA, AFL-CIO (Complainant) filed with the Public Employee Relations Board (Board) an Unfair Labor Practice Complaint with a request for injunctive relief against Council of School Officers (Respondent CSO) and its members who are employees of the D.C. Public Schools alleging that:

(1) Complainant is, and that Respondent CSO is not, the duly certified exclusive representative of certain employees of the D.C. Public Schools;

(2) Complainant and DCPS are parties to a collective bargaining agreement that will expire later in 1990 and that at the time the Complaint was filed the Complainant was soliciting proposals from unit members for possible inclusion in contract proposals to be submitted to DCPS in upcoming negotiations;

(3) Respondent CSO nonetheless had distributed literature to DCPS employees in the unit, a copy of which was attached as an exhibit to the Complaint, describing salary, benefit and working-condition "targets" for which Respondent CSO would "fight" in "upcoming negotiations ... on behalf of all school officers"; and

(4) By the conduct described in the preceding clause, Respondent CSO and the employees who are its members are interfering with rights provided Complainant and the unit members in violation of D.C. Code Section 1-618.4(b)(1).

Respondent CSO thereafter filed a timely response in which it did not address the allegation numbered (2) above, did not contest the distribution of literature described in allegation

[1] Member Squire recused herself from participation in the consideration and decision of this case.

numbered (3) above, denied the allegation numbered (4) above both on the merits and as beyond the scope of the Board's jurisdiction, and asserted that allegation numbered (1) above raised issues not appropriate for Board resolution for reasons that we will address below.

The Board's investigation of this matter included a request to the parties to submit briefs addressing in particular three matters that are set forth in a footnote below. [2]/ The briefs, which were to be simultaneously filed, were due by the close of business on July 24, 1990, and the Board's letter instructed the parties that "[n]o requests for extensions of time will be entertained." Complainant submitted a brief on the date specified. Not until August 1, however, did Respondent submit a brief, and then with no explanation of its untimeliness. Because it was out of time, Respondent CSO's brief was not filed and has not been considered by the Board.

Turning to the merits of the case, we discuss first the identity of the exclusive representative of the unit of DCPS employees with which this case is concerned, a matter that has been determined in prior proceedings before this Board. We considered there too the status of collective bargaining for that unit, a matter not in dispute here (see recitation above of the parties' positions with respect to allegation numbered (2)), and we deal there with Respondent CSO's argument that a pending federal court case precludes this one. Third, we discuss the significance under the CMPA, in this context, of the literature distribution by Respondent CSO which, again, is not in dispute here (see recitation above of the parties' positions on allegation numbered (3)). Finally, we discuss the significance of the First Amendment for this case. Because our conclusion is that Respondent's challenged conduct is indeed violative of D.C. Code Section 1-618.4(b)(1), we then address the question of appropriate relief.

1. Complainant correctly alleges that it is the exclusive representative of this unit of DCPS employees, so certified by the Board in June, 1988. See Council of School Officers, Local 4 and D.C. Public Schools, PERB Case No. 88-R-06, Certification No.

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[2]/ "(a) The relationship between D.C. Code Section 1-618.4(b)(1) and the conduct alleged in the complaint.

(b) The relevance, if any, of the First Amendment's protection of freedom of speech within the context of this Complaint.

(c) The legal issues raised by the Respondent's assertions in its Answer with respect to the Board's jurisdiction to order injunctive relief in this matter."

51. The Complainant further alleged, in a statement to which Respondent did not reply, that at the time the Complaint was filed, it was soliciting ideas from its members to include in its bargaining proposals to DCPS.

Respondent CSO would avoid the legal relationships thus produced by arguing that the relief sought by the Complainant raises issues that are before the U.S. District Court for the District of Columbia in Council of School Officers v. District of Columbia, et al., Civil Action No. 88-2020 and therefore, according to Respondent CSO, "not issues appropriate for resolution in this forum." That position is without merit. The issues in the two cases are different. The District Court proceeding involves a complaint filed by Respondent CSO against the Board, the District of Columbia, the Complainant and others challenging the election, and events preceding the election, in which the Complainant was elected and thereupon certified by the Board as the exclusive bargaining representative of the unit of principals, vice-principals and other supervisors employed by the DCPS. The Defendants in that proceeding have filed motions to dismiss or for summary judgment, which are pending before the court. In its Opposition to Plaintiff's Second Motion for Temporary Restraining Order at p. 6 (a Motion denied on June 27, 1989), the Board pointed out that the present Respondent could have challenged that election before the Board and, if not satisfied with the outcome, before the District of Columbia Superior Court. We further noted that the present Respondent, having for whatever reason not pursued its administrative remedies, "cannot now come to [the federal court] to pursue a remedy that it should have pursued under the Act at PERB and then in the local courts."

This case, in contrast to the case pending in the District Court, is an unfair labor practice proceeding concerning events well after Complainant's certification. And in this situation, the D.C. Court of Appeals has ruled that D.C. Code Section 1-605.2(3) which gives the Board "the power to ... [d]ecide whether unfair labor practices have been committed and issue an appropriate remedial order" means that "primary jurisdiction to determine unfair labor practice claims lies with the PERB, subject only to review by the [local] courts under well-established principles of administrative law." Hawkins v. Hall, 537 A.2d 571, (D.C. App. 1988).

2. The question whether Respondent CSO acted contrary to the CMPA's prohibition in distributing to the unit members here literature positing improvements in their wages and other working conditions for which it assertedly would "fight" in "upcoming negotiation on their behalf is not difficult to answer. D.C. Code Section 1-618.4(b)(1) prohibits "[e]mployees, labor organizations, their agents or representatives" from "interfering with, restraining, or coercing any employees...in the exercise of

rights guaranteed by this subchapter." And D.C. Code Section 1-618.6(a)(3) confers on covered employees "the right...[t]o bargain collectively through representatives of their own choosing...[.]" The employees in the unit here have chosen their representative, and it is Complainant, not Respondent CSO. Thus, Respondent CSO's challenged conduct is manifestly a deliberate attempt to interfere with these employees' exercise of their Section 1-618.6(a)(3) right, in violation of Section 1-618.4(b)(1), and we so hold. [3]/

3. Respondent CSO, in its Response to the Complaint, characterized its challenged conduct as "freely communicat[ing] with its members and other District employees through the United States Mail [sic] regarding matters of public concern...[.]" Respondent contends that its communications are therefore beyond the Board's jurisdiction.

The question is thus raised whether Respondent CSO's communication to unit members constituted protected speech insulated from the proscriptions of the CMPA by the First Amendment to the U.S. Constitution. A recent decision of the Supreme Court in a public sector labor relations case convinces us that this question must be answered in the negative. That case, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S.

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[3]/ While Complainant may be of two minds as to whether Respondent CSO is a labor organization -- having filed this complaint against "Council of School Officers" and referred to it as Respondent throughout, but also terming the entity a "purported labor organization" -- Respondent CSO does not seek to avoid the characterization as a labor organization but rather embraces it. Under these circumstances, we think it appropriate to treat the Respondent CSO as an entity covered by D.C. Code Section 1-618.4(b). As noted in the text above, subsection .4(b) governs the conduct of "employees" as well as labor organizations and their agents or representatives. Complainant's allegations are made against "all members of said group who are employees of [DCPS]" as well as the group itself. However, there is no evidence nor even an allegation in the record that members of the group themselves did anything at all, and similarly there is neither evidence nor allegation that any such member authorized the Respondent CSO to take the action here challenged. Thus, we have no basis for finding a violation by any such members. (Respondent CSO's agents and representatives who participated in or ratified the conduct here found violative of the law -- a category that may include its officers, for example -- may be held in their representative capacity.)

The Complainant has not raised any issue of a violation of D.C. Code Section 1-618.11(a) by the conduct here challenged. We therefore have no occasion to express any view on that question.

37 (1983). Perry upheld, against a First Amendment challenge, a collective bargaining agreement's grant to public school teachers' exclusive bargaining representative of exclusive access to certain means of communication. "There is no question," said the Court, "that constitutional interests are implicated by denying [the plaintiff rival union] use of the interschool mail system." Id. at 44. But it is also true, the Court "observe[d,] that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector." (Id. at 51, footnote omitted.) The differential access was upheld because it was a reasonable recognition of the "status of the respective unions rather than their views." (Id. at 49, emphasis in original). That is, the access provided to the bargaining representative and denied its rival enabled the former "to perform effectively its obligations as exclusive representative of all [the unit employees]" (Id. at 51, emphasis in original). The same is true here: application of D.C. Code 1-618.4(b)(1) to forbid Respondent CSO's communication to unit employees as if it were their bargaining representative (i.e., describing the improvements it would fight to obtain for them in upcoming negotiations) similarly is necessary to enable the Complainant, the bargaining representative they have chosen, "to perform effectively its obligations as exclusive representative of all" the unit employees. [4]/

We turn next to the Complainant's request that pursuant to D.C. Code Section 1-618.13(d), the Board award it costs incurred in bringing this action. We first addressed our "criteria for determining whether successful complainants should be awarded reasonable expenses" in AFSCME, District Council 20, Local 2776 v. D.C. Dept. of Finance and Revenue, 37 DCR 5658, Slip Op. No. 245, PERB Case No. 89-U-02 (1990). There we stated that "among the situations in which such an award is appropriate are those in which the losing party's claim or position was wholly without merit, those in which the successfully challenged action was undertaken in bad faith, and those in which a reasonably foreseeable result of the successfully challenged conduct is the undermining of the union among the employees for whom it is the exclusive bargaining representative" (Slip Op. at 5, emphasis added). There is no doubt that the "reasonably foreseeable result" of that conduct would be undermining among the employees

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[4]/ Our statute embodies the same judgment expressed by the Court when in Perry it reiterated its recognition in an earlier case that the "designation of an exclusive representative carries with it great responsibilities. The tasks of negotiating and administering the collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones." (Perry at 51-52, quoting from Abood v. Detroit Board of Educ., 431 U.S. 209, 221 (1977).)

of the Complainant's role as the exclusive bargaining representative.

We therefore include in our order a directive to the Complainant to file a statement of costs sought from the Respondent, with supporting materials, and to the Respondent CSO then to file whatever response it deems appropriate. The Board's Executive Director has authority (a) to convene a hearing if a hearing is then necessary; and, (b) if the parties are unable to agree as to the sum that Respondent CSO must pay to Complainant, to bring the matter to the Board for decision on the amount of reasonable costs.

Because of the tendency of Respondent CSO's conduct to create confusion among the unit employees as to the identity of their representative, we conclude, finally, that it is necessary for the Respondent CSO to act to dispel this effect of its unlawful conduct. We shall therefore order that Respondent CSO send a copy of the Notice attached hereto to each of the employees in the affected bargaining units.

ORDER

IT IS HEREBY ORDERED THAT:

1. The Council of School Officers and its agents and representatives shall cease and desist from communicating to employees represented by Council of School Officers, Local 4, AFSA, AFL-CIO that it will fight on their behalf or otherwise represent their interest in collective bargaining negotiations with the District of Columbia Public Schools.

2. The Council of School Officers and its agents and representatives shall cease and desist from interfering with, restraining, or coercing, in any like or related manner, employees represented by Council of School Officers, Local 4, AFSA, AFL-CIO in the exercise of rights guaranteed by the Comprehensive Merit Personnel Act of 1978.

3. The Council of School Officers shall send the attached Notice to all employees in the following bargaining units within ten (10) days of the service of this opinion. [5]/

    1. ET Officers Bargaining Unit: All Employees employed by the Board of the ET-6 through ET-12

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[5]/ Council of School Officers, Local 4, AFSA, AFL-CIO may, of course, post copies of the attached notice in its office(s) and on any bulletin boards at the work sites which it has been authorized to use for communications to bargaining unit employees.

classifications, but excluding confidential employees, employees engaged in personnel work in other than a purely clerical capacity, employees engaged in administering the provisions of Title XVII of the Comprehensive Merit Personnel Act of 1978.

2. EG Officers Bargaining Unit: All full-time personnel employed by the Board who are rendering educational, technical and administrative support services in EG classifications 11 and 12; but excluding employees engaged in personnel work other than in purely clerical capacities and employees engaged in administering the provisions of Title XVII of the Comprehensive Merit Personnel Act of 1978.

4. The Council of School Officers shall notify the Public Employee Relations Board, in writing, within fourteen (14) days of the date of this Order as to the steps it has taken to comply with the directives in paragraph No. 3 of this Order.

5. The Council of School Officers, Local 4, AFSA, AFL-CIO shall submit to the Board, within fourteen (14) days from the date of this Order, a statement of the costs sought from the Respondent CSO together with supporting documentation; Council of School Officers may then file a response to the statement within fourteen (14) days from service of the statement upon it.

6. The Council of School Officers shall pay to Council of School Officers, Local 4, AFSA, AFL-CIO its reasonable expenses incurred in this proceeding within ten (10) days from the determination by the Board or its designee as to the amount of those reasonable costs.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

November 1, 1990

PERB Public Employee Relations Board

Government of the District of Columbia

415 Twelfth Street, N.W.
Washington, D.C. 20004
[202] 727-1822/23
Fax: [202] 727-9116

NOTICE

TO ALL EMPLOYEES OF THE DISTRICT OF COLUMBIA PUBLIC SCHOOLS REPRESENTED BY COUNCIL OF SCHOOL OFFICERS, LOCAL 4, AFSA, AFL-CIO, THIS OFFICIAL NOTICE IS BEING DISTRIBUTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN OPINION NO. 256, PERB Case No. 90-U-08 (November 1, 1990)

WE HEREBY NOTIFY all employees represented by Council of School Officers, Local 4, AFSA, AFL-CIO, in the units described below, that the Public Employee Relations Board has found that we violated the law and has ordered us to send you a copy of this Notice.

The Public Employee Relations Board has certified the Council of School Officers, Local 4, as the exclusive bargaining agent for the following units of employees:

1. ET Officers Bargaining Unit: All Employees employed by the Board in the ET-6 through ET-12 classifications; but excluding confidential employees, employees engaged in personnel work in other than a purely clerical capacity, employees engaged in administering the provisions of Title XVII of the Comprehensive Merit Personnel Act of 1978.

2. EG Officers Bargaining Unit: All full-time personnel employed by the Board who are rendering educational, technical and administrative support services in EG classifications 11 and 12; but excluding management, supervisors, confidential employees, any employees engaged in personnel work other than in purely clerical capacities and employees engaged in administering the provisions of Title XVII of the Comprehensive Merit Personnel Act of 1978.

WE WILL cease and desist from communicating in any manner to employees for whom Council of School Officers, Local 4, AFSA, AFL-CIO, is the duly certified representative that we are acting and/or will attempt to act on their behalf in collective bargaining negotiations or any other capacity that is afforded an

WE WILL pay the reasonable expenses incurred by Council of School Officers Local 4 for the filing and processing of this complaint.

Council of School Officers

Date:_____ By:_____

President

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 415-12th Street, N.W. Room 309, Washington, D.C. 20004 Phone 727-1822.