Franklinton Preparatory Academy *and* Franklinton Preparatory Academy Educators Association, Petitioner. Case 09–RC–144924

April 20, 2018

DECISION AND DIRECTION

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

The National Labor Relations Board, by a three-member panel, has considered determinative challenges and objections to an election held March 5, 2015, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 4 against the Petitioner, with 1 void ballot and 3 challenged ballots, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the hearing officer's findings[1] and recommendations, only to the extent consistent with this Decision and Direction.

We agree with the hearing officer's recommendation to overrule the challenge to the ballot of Anne Hyland.[2] In addition, for the reasons that follow, we agree with the hearing officer's recommendation to sustain Petitioner's Objection 3, alleging that the Employer threatened employees against exercising their rights protected by Section 7 of the Act.[3]

On February 28, 2015, just a few days before the election, Chief Operating Officer Marty Griffith sent an email to employee Julie Pfeifer. Through a series of rhetorical questions, Griffith detailed to Pfeifer numerous favorable employment conditions, such as pay increases, personal development days, and hiring and training flexibilities. After doing so, Griffith asked Pfeifer to consider several "facts," including the following:

> If FPA is unionized, I suspect that FPA's Board will take a very hard line on the pay, benefits, working conditions, PD [professional development] days and other things that I've worked so hard to bring to FPA. And please remember that I work for the Board. As much as some may hope, it is unrealistic to believe that the Board will welcome unionization at FPA.

Prior to the election, Pfeifer shared the details of Griffith's email with three other employees in the petitioned-for unit.

In evaluating party conduct during the critical period, the Board applies an objective standard under which conduct is found to be objectionable if it reasonably tends to interfere with employee free choice. *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004), citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). In determining whether election misconduct warrants setting aside the election result, the Board considers (1) the number of incidents of misconduct; (2) the severity of the incidents and whether they were likely to cause fear among employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election date; (5) the degree of persistence of the misconduct in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among bargaining unit employees; (7) the effect, if any, of the misconduct by the opposing party to cancel out the effect of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. Id.

We find that employees would reasonably understand Griffith's statements above to threaten them with the loss

[1] The Petitioner has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

[2] The Petitioner challenged the ballots of employees Herbert Hatch, Anne Hyland, and Beth Dewitt. At the hearing, only the challenges to the ballots of Hyland and Dewitt were before the hearing officer, as the Regional Director had previously sustained the challenge to the ballot of employee Hatch, pursuant to an agreement by the parties. Regarding Anne Hyland, we adopt the hearing officer's recommendation to overrule the Petitioner's challenge to her ballot. As a result, we direct the Regional Director for Region 9 to open and count her ballot. In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to sustain the Petitioner's challenge to the ballot of Beth Dewitt.

[3] Contrary to the hearing officer's recommendation, we overrule the portion of Petitioner's Objection 5, alleging that the Employer promised benefits to unit employees if they voted against union representation. The hearing officer found that Griffith's statement "[i]f I haven't done what I say we can do, another Union election can be held in 366 days" constitutes an implicit promise of benefits. We disagree. The statement does not promise that anything in particular will happen, and it was not accompanied by any request to air specific concerns or any other promise or grant of specific benefits. Under these circumstances, we find that the statement is merely a generalized request for another chance or more time and thus falls within the limits of permissible campaign propaganda. Cf. *Noah's New York Bagels*, 324 NLRB 266, 267 (1997).

In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to overrule Petitioner's Objection 4, alleging that the Employer interrogated unit employees about their union support and activities, and the portion of Petitioner's Objection 5, alleging that the Employer granted benefits to employees, such as scheduling earlier staff meetings, increasing frequency of early-release Fridays, and switching to an "open lunch" plan, during the critical period.

of existing benefits and terms and conditions of employment if they voted for union representation. After reminding Pfiefer about favorable working conditions and benefits, Griffith shared his belief that if the employees voted for unionization, the board "will take a very hard line" on these terms and benefits. In addition, Griffith emphasized that, although he had brought many of those benefits to employees, he was subservient to the board, warning Pfeifer that "it is unrealistic to believe that the [b]oard will welcome unionization[.]" Moreover, these "facts" conveyed by Griffith lacked any objective basis and did not predict demonstrably probable consequences beyond the Employer's control. See generally *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618–619 (1969). Griffith offered no evidence that unionization would lead to significant new costs for the Employer that would necessitate reductions in existing benefits. Nor did his remarks explain how a change in existing benefits and working conditions could result from the give-and-take of future collective bargaining. Instead, Griffith's remarks clearly suggested that employees, by entertaining the prospect of union representation, were courting the wrath of the Employer's board. As a result, Griffith's statements went well beyond merely advising employees of the potential consequences of good-faith collective bargaining and instead constituted statements threatening the loss of existing benefits and terms and conditions of employment.[4]

In addition, given the circumstances surrounding Griffith's threatening statements we find that they would reasonably tend to interfere with employee free choice in the election. Griffith was the highest ranking member of management at the school and an individual whom the employees understood worked closely with the board. Griffith made the statements just days before the election, and the statements were made and disseminated to approximately one-third of the employees in the petitioned-for unit. Moreover, the statements were made in the context of a very close election, where one vote could change its outcome. In these circumstances, we find that Griffith's statements warrant setting aside the election if the revised tally of ballots shows employees voted against representation.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 9 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Anne Hyland. The Regional Director shall then prepare and cause to be served on the parties a revised tally of ballots.

IT IS FURTHER DIRECTED that if the revised tally of ballots shows that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the ballots cast, the Regional Director shall set aside the election and conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

Dated, Washington, D.C. April 20, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, dissenting in part.

Contrary to my colleagues and the hearing officer, I would not find that the Employer's chief operating officer, Marty Griffith, made an objectionable threat in an email sent to prounion employee Julie Pfeifer on February 28, 2015, a few days prior to the March 5 election.[1]

[4] Our dissenting colleague would find that Griffith's "hard line" statement in the February 28 letter was not objectionable. In his view, in the context of other communications from the Employer during the critical period, employees would reasonably understand Griffith's statement as a lawful reference to the give-and-take of good-faith collective bargaining. Specifically, he contends that employees would view the remark as merely suggesting that the Employer's board would be unlikely to agree to any improvements in pay and benefits as part of the collective-bargaining process. We disagree. To be sure, in the weeks leading up to the election, the Employer, through notices to employees and statements at a meeting, discussed how the collective-bargaining process works once a union is certified, and the Employer's statements in this regard are not alleged to be objectionable. But Griffith's remarks in the February 28 letter are different in that they do not seek to address, explicitly or implicitly, the give-and-take of the collective-bargaining process. Instead, the letter focuses on the consequences of unionization and, without any reference to the collective-bargaining process whatsoever, conveys the view that the Employer's board "will take a very hard line" on employee's pay, benefits, and other terms and conditions of employment. Even considering that the Employer may have been conveying unobjectionable information about the collective-bargaining process to employees in other contexts, Griffith's remarks in the February 28 letter were nonetheless coercive as they clearly portended the loss of benefits in the event of unionization without offering any objective basis for doing so.

[1] I agree with my colleagues on the remaining contested issues. Specifically, I join them in adopting the hearing officer's recommendation to overrule the challenge to employee Anne Hyland's ballot, and I join them as well in overruling that part of Petitioner's Objection 5 alleging that Griffith promised benefits if employees voted against representation.

Specifically, I would find that Griffith did not implicitly threaten unilateral retaliatory action by stating he suspected the charter school board would not welcome unionization and would take a very hard line on the improved wages, benefits, and working conditions that Griffith had secured for unit employees. Particularly when read in context with flyers distributed immediately prior to this email and in the absence of any other objectionable statements made during the entire preelection campaign, employees would reasonably understand Griffith's observation as a lawful reference to the give and take of good-faith collective bargaining. Accordingly, as to this issue, I respectfully dissent from the failure to overrule Petitioner's Objection 3.[2]

The email at issue was the third sent in a short time period to Pfeifer, an open employee leader in the organizing campaign. The first two, sent on February 25 and 27, respectively, included flyers that were distributed to all unit employees. Nothing in these documents was alleged to be objectionable. Indeed, both of them lawfully emphasize the give-and-take nature of collective bargaining. The February 25 flyer focused almost entirely on this process. It expressly and correctly stated that, if the Union won the election, employees would represent it and the Employer would be obligated to bargain with it. However, it would not be compelled by the Act to agree to a proposal and would reject in good faith "any Union demands for wages and benefits and working conditions that are unrealistic, unreasonable**,** or would cause us to run over our budget." Further, the flyer correctly emphasized that "if collective bargaining begins, then everything becomes subject to collective bargaining including, but not limited to: FPA's current wages, FPA's current benefit package (sick days, personal days, types and depth of insurance coverage FPA could afford) PD [professional development] days, teachers' dedicated workday, duty schedules and student to teacher ratios. Everything***."***

The February 27 flyer reiterated the message that "[i]f the Union is voted in: ***Everything*** we currently enjoy at FPA—our wages, our benefits, the number of PD days, flexible scheduling, sick days, personal days, dedicated work days, ***EVERYTHING***—will be subject to negotiation. There is ***no predicting*** what conditions will win in the end."

Griffith's private February 28 email to Pfeifer reminded her that the teachers had received a 5-percent wage increase the previous year, that FPA built 28 days of professional development into the previous year's schedule—in contrast to the 3 or 4 professional development days employees are "lucky" to get at "union" schools, and that FPA "spend[s] thousands of dollars every year training our teachers." Finally, as the seventh of eight enumerated "facts" set forth near the end of the email, Griffith wrote:

> If FPA is unionized, I suspect that FPA's Board will take a very hard line on the pay, benefits, working conditions, PD days and other things that I've worked so hard to bring to FPA. And, please remember that I work for the Board. As much as some may hope, it is unrealistic to believe that the Board will welcome unionization at FPA.

Further, on March 4, the day before the representation election, Griffith convened a meeting of all unit employees. At this meeting, Griffith read aloud from a script, and employees DeWitt and Hyland testified that Griffith stuck to the script. There are no allegations that the script contained any objectionable statement. In relevant part, the script stated

> What does that mean—to be represented by the Union in collective bargaining? First of all, it means that everything goes to the bargaining table—absolutely everything. Even the wages and benefits we currently have are subject to bargaining. And right now you have pretty good wages and very good benefits. This is especially true given that, as a charter school, we receive an estimated 65 cents to every dollar that traditional district schools receive in public funding—and, unlike them, we also have to pay for our own building with that funding.
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> Also, more than just wages and benefits are subject to bargaining. Sick days, personal days, the defined work-day, the maximum number of students in each class, employee parking, vending machines, breaks, even what goes on the bulletin boards in the Main Office, becomes subject to bargaining. . . .
>
> And the fact that we have to bargain with the Union does not necessarily mean that wages or benefits will go up or that conditions will improve. Wages and benefits could stay the same or even go down depending on the result of the negotiations. FPA's bargaining position will depend on a lot of factors including our budget, finances and economic conditions. And, as

[2] The initial tally of ballots showed 5 votes for and 4 votes against the Union. Because I would find no merit in Petitioner's Objection 3, I would direct the Regional Director to open and count Hyland's ballot and issue the appropriate certification—a certification of representative if Hyland voted for the Union and a certification of results if she voted against it.

> you know, our budget and finances depend significantly on our student enrollment numbers. Having a Union here at FPA certainly won't do anything to increase our student population.
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> Look at what could happen in collective bargaining. Although I assure you that if we are required to bargain, we will bargain in good faith, FPA will not agree to any demands that are unreasonable, unrealistic, or that could jeopardize our ability to compete for students. The law does not require us to agree to any such demands.
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> . . . .
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> You may ask why our School would resist unreasonable demands by bargaining hard . . . . [W]e will bargain hard because we want to be able to continue to work toward fulfilling our mission and that requires us to be financially healthy enough to compete for students. . . . Also, keep in mind that just because a Union is here doesn't mean we will get any more students, get higher funding from the State of Ohio, or do our jobs any better.

Out of all of the foregoing campaign communications from Griffith to Pfeifer and other unit employees, my colleagues find objectionable only the single passage from the February 28 email in which he states that the school board will take a hard line on improvements he worked hard to bring to employees and will not welcome unionization. In my colleagues' view, employees would reasonably view these statements as threatening them with "the loss of existing benefits and terms and conditions of employment if they voted for union representation." I disagree.

"An employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618 (1969) (quoting from Section 8(c) of the Act). That is what Griffith did in his several communications to employees from February 25 through March 4, both before and after the allegedly objectionable statement in the February 28 email. In this context, with numerous accurate descriptions of the Employer's bargaining obligation and to the give-and-take and potential pitfalls for employees of collective-bargaining negotiations, unit employees would reasonably understand Griffith's "hard line" reference in the February 28 email to Pfeifer as suggesting that FPA's Board would be unlikely, in collective bargaining, to agree to improvements in pay and benefits.[3]

My colleagues say that Griffith's email threatened that existing benefits and working conditions would *change*, and change for the worse. Of course, Griffith did not say that existing benefits and working conditions would change at all. He only said that FPA's Board of Directors would take a very hard line on pay, benefits, and other working conditions. But even if the phrase could be interpreted as implying a potential change for the worse, the statement would still be unobjectionable in light of Griffith's repeated statements to all unit employees before and after the February 28 email that any changes would only come about as a result of collective bargaining, not in immediate retaliation against a vote for unionization. It is only by erroneously focusing in isolation on the one statement in Griffith's February 28 email—ignoring everything else Griffith said to Pfeifer and to the rest of the unit employees in campaign flyers and in his election eve speech—that an objectionable threat could be implied.

Accordingly, I respectfully dissent from my colleagues' failure to overrule Petitioner's Objection 3 in its entirety.

Dated, Washington, D.C. April 20, 2018

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

[3] Griffith's email did state that it was "unrealistic to believe that the Board will welcome unionization at FPA," but it is not objectionable for an employer to state that it will not welcome unionization and I do not read my colleagues' opinion as expressing a contrary view.