United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 30, 1999

TO : William C. Schaub, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The International Plant Guard Workers
and its Local 114 (Pinkerton, Inc.)
Case 7-CB-12075 536-5075-5083-2525
536-5075-5083-5000

This Section 8(b)(1)(A) case was submitted for advice on whether the Unions lawfully removed a member from his elected position on the Local Union's Executive Board because the member threatened to recommend to other members that they decertify the International Union.

Charging Party Rzezsut is employed in a nationwide unit of approximately 1700 employees represented by the International. The Local is one of 26 locals and has around 220 members in the nationwide unit. In March 1998, Rzezsut was elected to the Local's Executive Board for a three year term; Rzezsut also is a Local Chairperson.[1]

On May 27, 1998, Rzezsut held a meeting with International and Local officials to address a number of grievances. During the meeting, Rzezsut stated that the International and the Local officials didn't back the membership and that Rzezsut was going to recommend that the membership decertify the Union. The International President thereupon "orally suspended" Rzezsut from his Local Union Executive Board position. However, the International did not thereafter initiate any of the actions required under its Constitution and Bylaws to properly file charges against or suspend Rzezsut.

In January 1999, the Local's Executive Board appointed a replacement into the vacancy left by the removal of Rzezsut. However, that appointee resigned his employment shortly thereafter. In April, the International President told Rzezsut that internal union charges would not be brought against him for the decertification threat, because the Local Union claimed that Rzezsut had resigned his

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[1] It is not clear whether Rzezsut was elected or appointed to the Chairperson position.

position on the Executive Board.[2] In July, the Local Union made a second appointment to Rzezsut's vacant position. Throughout these events, Rzezsut retained his position as Local Chairperson.

We conclude that the Unions unlawfully removed Rzezsut from his elected position in retaliation against his protected internal union dissident activities, and not for the pretextual reason that he threatened to recommend that the membership decertify the Unions.

We have argued that where a union official has been elected to an internal union position rather than appointed, the union has no right to remove such a member-elected official for having engaged in internal union activity protected under the LMRDA.[3]

Title I of the LMRDA, 29 U.S.C. 411(a)(2), confers upon union members the right to participate freely in the internal affairs of a union, and was "aimed at enlarging protection for members of unions paralleling certain rights guaranteed by the Federal Constitution" in order to further the basic Congressional objective of "ensuring that unions [are] democratically governed and responsive to the will of their memberships."[4] Title VI of the LMRDA, 29 U.S.C. 529, makes it unlawful for a union "to fine, suspend, expel, or otherwise discipline any of its members" for exercising LMRDA rights. The discharge or removal of union employees for engaging in dissident activity, under certain circumstances, has been found to violate the LMRDA. Thus, in Finnegan v. Leu, 456 U.S. 431, 110 LRRM 2321 (1982), and Sheet Metal Workers v. Lynn, 488 U.S. 347, 130 LRRM 2193 (1989), the Supreme Court distinguished between elected and appointed business agents.

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[2] In April 1998, one year before Rzezsut's decertification threat, the Local's President announced at an Executive Board meeting that Rzezsut had filed Board charges against the Union. The Local's assertion that Rzezsut resigned is based upon Rzezsut's reply at that time that "I might as well quit." Rzezsut denies that he resigned his position by making this statement.

[3] See, e.g., SEIU, Local 254 (Brandeis University), Case 1-CB-8835, Advice Memorandum dated January 9, 1997.

[4] Finnegan v. Leu, 456 U.S. 431, 435, 436 (1982).

In Finnegan, the Court held that a union's removal of an appointed agent is not violative of Titles I or VI of the LMRDA because the claims of the discharged employees, with whose LMRDA rights the union had interfered, were inconsistent with democratic union governance. Therefore, the LMRDA does not "restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own." 456 U.S. at 441.

Subsequently, in Lynn, the Court found unpersuasive the argument that the removal of an elected agent similarly cannot violate the LMRDA. The Court again stressed that a determination whether interference with LMRDA rights gives rise to a Title I violation must be weighed against the statute's basic objective of democratic governance. 488 U.S. at 354. In distinguishing Finnegan, the Court in Lynn observed that when elected officials are removed, "the union members are denied the representative of their choice", and to deprive them of "leadership, knowledge, and advice" during an important time of union policy-making does not constitute "an integral part of ensuring a union administration's responsiveness to the mandate of the union election."[5] The Court further held that "the potential chilling effect on Title I free speech rights is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him." 488 U.S. at 355 (citation omitted). Therefore, a union's retaliatory removal of an elected official states a cause of action under Title I of the LMRDA. Ibid. Federal courts have subsequently applied Lynn to various forms of retaliation against elected union officials who oppose or criticize the union's leadership.[6] Thus, in the instant case, if it can be shown that Rzezsut was removed from his elected steward position because of his

[5] 488 U.S. at 355, quoting Finnegan, 456 U.S. at 441.

[6] See Guzman v. Bevona, 810 F.Supp. 509, 511-12 (S.D.N.Y. 1992) (denial of motion to dismiss LMRDA claim that steward was unlawfully excluded from stewards' meeting where steward contended that he was elected); Duffy v. IBEW Local 134, 780 F.Supp. 1185, 1189 (N.D.Ill. 1991) (same, where union refused to reinstate member to elected executive board position); Stroud v. Senese, 832 F.Supp. 1206, 1212 (N.D.Ill. 1993) (same, involving discharged elected official, stating that after Finnegan and Lynn, LMRDA provides "a cause of action for retaliatory discharge of elected officials, but not for patronage employees, because each affects the democratic process of a union differently").

internal union dissident activity, there is an LMRDA violation under Lynn and arguably a resultant Section 8(b)(1)(A) violation.

We would argue, in agreement with the Region, that both the International and the Local Union used Rzezsut's decertification threat as pretextual rationale to remove him from his elected position because of his coincidental internal dissident activities. In this regard, the International merely "orally suspended" Rzezsut and never brought the requisite internal charges nor complied with its own Constitution and Bylaws to formally accomplish the suspension. In addition, the Local Union otherwise allowed Rzezsut to continue in his Local Chairperson role despite the alleged seriousness of his decertification threat. Finally, the Unions' assertion, that Rzezsut's offhand remark one year earlier amounted to a "resignation" of his Executive Board position, is wholly without merit and provides further evidence of the Unions' pretextual motive. All these circumstances arguably establish that the Unions were not genuinely concerned with Rzezsut's decertification threat.[7] Instead, Rzezsut's threat was merely a pretextual basis for the Unions to retaliate against Rzezsut because of his coincidental internal dissident activities.

We would not allege in the alternative that, assuming no pretext, the Unions nevertheless unlawfully removed Rzezsut from his elected Local Union position for making the decertification threat. The Board has drawn a distinction between the lawfulness of a union's expelling a member, as opposed to fining a member for filing a decertification petition.[8] Subsequently, the Board expanded its rationale in Blackhawk Tanning, and held that a union could take other defensive measures, in addition to expulsion, against a member for having circulated a decertification petition. In Machinists, Lodge No. 66,[9] the Board found the imposition of a fine for such conduct unlawful, but found no violation to

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[7] In this regard, we also note that only 220 unit employees were encompassed by Rzezsut's threat in a nationwide unit of approximately 1700 employees.

[8] Compare Tawas Tube Products, Inc., 151 NLRB 46 (1965)(expulsion lawful) with International Molders' and Allied Workers Union, Local 125 (Blackhawk Tanning), 178 NLRB 208, 209 (1969), enforced, 442 F.2d 92 (7th Cir. 1971)(fine unlawful).

[9] Machinists, Lodge No. 66 (Smith-Lee Co., Inc.), 182 NLRB 849 (1970).

the extent that the union also removed an elected chairman of the shop committee from that office, and additionally barred him from holding office for three years. Id. at 850. In sum, assuming no pretext here, the Unions lawfully removed Rzezsut from his elected position.

B.J.K.