

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRANKLINTON PREPARATORY ACADEMY	:	
EDUCATORS ASSOCIATION,	:	
	:	Case: 09-RC-144924
Petitioner,	:	
	:	
and	:	
	:	
FRANKLINTON PREPARATORY ACADEMY,	:	
	:	
Employer.	:	

ANSWERING BRIEF OF PETITIONER

I. STATEMENT OF THE CASE

This case involves a Petition filed by the Franklinton Preparatory Academy Educators Association seeking a representation election for certain employees of the Employer, Franklinton Preparatory Academy. (Ex. Bd. 1(a)). The parties entered into a Stipulated Election Agreement approved February 5, 2015. (Ex. Bd. 1(b)). In their Stipulated Election Agreement, the Parties defined the bargaining unit as follows:

All full-time and regular part-time professional employees who regularly work at least ten (10) hours per week during the school year, including teachers, behavioral intervention specialists, counselors, tutors, academic workforce liaisons and hybrid learning coordinators, but excluding all non-professional employees, casual employees, substitute employees, confidential employees, managerial employees, and all office clerical employees, guards and supervisors as defined by the Act.

Pursuant to the Stipulated Election Agreement, a representation election was conducted on March 5, 2015. The results of the election were five votes for the Petitioner, four votes against representation by the Petitioner, one voided ballot and three challenged ballots. (Ex. Bd. 1(d)). The ballots challenged by the Petitioner are determinative of the outcome of the election. The Petitioner also filed several timely objections to the election based upon the Employer's conduct

during the critical period. (Ex. Bd. 1(c)). In Objection 3, the Petitioner asserted that “[d]uring the critical period, management threatened employees against exercising their rights protected by Section 7 of the Act.” (*Id.*). In Objection 5, the Petitioner asserted that “[d]uring the critical period, management promised and granted benefits to workers to discourage them from supporting the Association.” (*Id.*).

The Regional Director issued a Report on Challenged Ballots, Report on Objections, Order Directing Hearing and Notice of Hearing on March 31, 2015, finding that the challenges to the ballots of Anne Hyland and Beth DeWitt and three of the Petitioner’s objections raised substantial and material issues of fact which could best be resolved by the conduct of a hearing. (Ex. Bd. 1(d)).¹

A hearing was conducted on April 16, 17 and 20, 2015, by Hearing Officer Naima R. Clarke. The Hearing Officer issued her Report and Recommendations on May 14, 2015, in which she recommended sustaining Petitioner’s challenge to the ballot of Beth DeWitt, overruling Petitioner’s challenge to the ballot of Anne Hyland, and sustaining the Petitioner’s objections regarding Objection 3 and part of Objection 5. The Hearing Officer recommended that, if the revised Tally of Ballots does not favor the Petitioner, the election held on March 5, 2015, be set aside and a new election be conducted.

This Brief is filed in response to the Employer’s Exceptions to the Hearing Officer’s Report and Recommendations and supporting Brief filed May 28, 2015. The Employer’s Exceptions involve only the Hearing Officer’s recommendations to sustain the Petitioner’s Objection 3 and part of Objection 5 and to set aside the results of the election and conduct a new election if the revised tally of ballots does not favor the Petitioner.

¹ The Employer conceded that the third individual whose ballot the Petitioner challenged was not part of the bargaining unit, and that issue is no longer pending.

II. STATEMENT OF FACTS

The Employer is a charter (community) high school in the Franklinton neighborhood of Columbus, Ohio. (Tr. 551). The school opened for the 2013/2014 school year. (*Id.*). The Petitioner filed the petition for the representation election on January 23, 2015. (Ex. Bd. 1(a)). The Employer's submitted *Excelsior* list included thirteen individuals, three of whom were challenged by the Petitioner. (Ex. J 4).

Julie Pfeifer is employed by the Employer as a teacher for freshman English and math. (Tr. 165). She began her position of employment on or about September 22, 2014. (*Id.*). Her supervisor is Chief Operating Officer (COO) Marty Griffith. (Tr. 167-168). Griffith has the authority to terminate her employment, discipline her and grant her benefits. (Tr. 168). Pfeifer and two coworkers expressed their support for the Union organizing campaign by reading a letter to Griffith at or around the time the petition was filed. (Tr. 183).

On Saturday, February 28, 2015, during the critical period and five days before the representation election scheduled for March 5, 2015, Griffith sent an e-mail to Pfeifer. (Tr. 184; Ex. P 2). The e-mail included nineteen numbered paragraphs containing statements and questions Griffith raised to Pfeifer regarding the Union organizing campaign. Among the contents of the e-mail were numerous statements regarding wages, benefits and terms and conditions of employment currently provided to the Employer's teachers and staff. For example, the e-mail referenced that, the previous year, contracts were offered to one hundred percent of the teachers to return and the entire teaching staff received a five percent pay increase, that there were twenty-eight days of professional development built into the schedule, and that one employee was provided a twenty percent pay increase. (Ex. P 2). The e-mail also contained personal information regarding two employees. (*Id.*).

The second half of the e-mail was introduced with the following phrase, “However, I do oppose this union at this time and would like for you to consider these facts:” followed by eight numbered paragraphs. (*Id.*) Paragraph 1 after that introduction states, in relevant part, “What’s the union rush?? If I haven’t done what I say we can do, another union election can be held in 366 days -- one year and one day following the Thursday election.” (*Id.*) Paragraph 7 after the introduction of “facts” states “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.” (*Id.*).

Upon receipt of the e-mail, Pfeifer felt confused because she did not know if other workers had received a similar e-mail. (Tr. 185). When, after discussing the e-mail with her coworkers, she discovered that she was the only person who had received such an e-mail, she felt targeted. (*Id.*) Pfeifer forwarded the e-mail to bargaining unit employees Camille Ward and Ryan Marchese on February 28, 2015. (*Id.*) Pfeifer discussed the contents of the e-mail with Ward, Marchese and other bargaining unit employees Shayna Wade-Argus and Geral Leka. (Tr. 186). Pfeifer specifically discussed the “hard line” statement and the “fact” statements of the e-mail with Wade-Argus. (Tr. 224). Marchese discussed the e-mail with bargaining unit employees Pfeifer, Leka, Ward, Wade-Argus and Hobbs prior to the election. (Tr. 123, 126, 160).

Pfeifer perceived the e-mail to be stating that “if I did go ahead with the union, that things were going to change. So once - - you know, I kind of felt like it was threatening me, that if I went ahead with the union, that what I knew now would not be the same later.” (Tr. 187). Marchese found the e-mail to be intimidating and inappropriate. (Tr. 124).

III. ARGUMENT

A. **Standard of Review.**

In all cases that come before this Board,

we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the [Hearing Officer's] findings. Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the [Hearing Officer], but not the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a [Hearing Officer's] credibility findings insofar as they are based on demeanor. Hence we do not overrule a [Hearing Officer's] resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces us that the [Hearing Officer's] resolution was incorrect.

Standard Dry Wall Products, Inc., 91 NLRB 544, 545 (1950) (emphasis in original). The Hearing Officer's recommendations to sustain Objection 3 and the portion of Objection 5 related to Griffith's February 28, 2015, e-mail and to set aside the election if necessary are fully supported by the record evidence and governing legal precedent. This Board should sustain Petitioner's Objections in conformity with the Hearing Officer's recommendations.

B. **The Employer engaged in improper conduct necessitating the setting aside of the election if the revised tally of the ballots does not favor the Petitioner.**

The Hearing Officer properly determined that the Employer, through Griffith, unlawfully threatened retaliation against the employees for supporting the Union and unlawfully promised employees benefits in exchange for refraining from supporting the Union. The Hearing Officer properly analyzed the relevant factors to determine that the Employer's unlawful conduct reasonably tended to interfere with employee free choice and warranted the setting aside of the election and the conduct of a new election. (RR, p. 14). This Board should affirm the Hearing Officers findings and recommendations with regard to the Petitioner's objections.

1. The Hearing Officer correctly determined that Griffith unlawfully threatened retaliation against the employees for supporting the Union in his February 28, 2015, e-mail.

The Hearing Officer correctly determined that Griffith's statement regarding the Employer's Board taking a hard line with respect to pay, benefits and working conditions if the employees selected the Union was an unlawful threat. (Exceptions 1, 2, 3). The Hearing Officer's recommendation is fully supported by the record evidence and governing legal precedent.

The Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969), held that an employer may lawfully communicate to his employees "carefully phrased" predictions based on "objective facts" as to "demonstrably probable consequences beyond his control" that he believes unionization will have on his company. However, the Court cautioned that if there is "any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him," the statement is a threat of retaliation.

Southern Labor Services, 336 NLRB 710 (2001). As the Hearing Officer noted, the e-mail discloses no other basis for the Employer's "hard line" except for the employees' selection of the Union. (Ex. P 2). Furthermore, the statement was made among an exhaustive overview of the favorable terms and benefits that Griffith had "worked so hard to bring to FPA." (RR, p. 11). The Hearing Officer correctly determined that Griffith's statement and the context of the e-mail would lead employees to reasonably infer, as Pfeifer did, that the Employer would revoke its generosity if the Union was elected. (Tr. 187).

The Employer's argument that the basis for Griffith's statements was the Employer's financial state is completely baseless. The paragraph at issue begins with "If FPA is unionized, I suspect that FPA's Board will take a very hard line on the pay, benefits, working conditions. . ." Further, the paragraph concludes with "As much as some may hope, it is unrealistic to believe that the Board will welcome unionization at FPA." (Ex. P 2). There is no reasonable basis from

which to conclude that the statements contained in the paragraph speak to any facts outside of the Employer's control or that the Employer's Board would take a hard line regarding pay, benefits, and working conditions for any reason other than the employees' selection of the Union. Griffith's statement was an unlawful threat of retaliation, as the Hearing Officer properly determined.

While other Employer communications claimed that the Employer's budget was tight, there was no similar sentiment in the February 28, 2015, e-mail in question. (Exs. E 10, E 11, P 2). Further, there is no connection as to why a tight budget would lead to lesser pay, benefits or working conditions or to how the Union would possibly impact the Employer's finances. Griffith's threatening statements were not carefully phrased predictions based on objective facts as to demonstrably probable consequences beyond his control that he believed unionization would have on the Employer. Instead, they were unlawful threats of retaliation, and the Hearing Officer correctly recommended that the Board sustain Objection 3.

The Employer relies on *International Paper Co.*, 273 NLRB 615 (1984), for its argument that Griffith's statements were not threats. The employer in *International Paper* stated that, through bargaining, wages and benefits could go up, go down or stay the same. Further, the employer asserted numerous times that it would engage in good faith negotiations, but noted that it would not accept proposals it deemed bad for business. The employer discussed wage rates at other unionized mills as factual support for its assertion that the union could agree in negotiations to lower wages and benefits than the employees currently enjoyed. Griffith's statement, in contrast, did not contain any discussion of good faith negotiations by the Board, of hard bargaining for business-related reasons, or anything similar to the statements in

International Paper. Griffith instead communicated the Employer's intent to retaliate against employees with regard to their pay, benefits and working conditions if they selected the Union.

Similarly, statements such as that bargaining "starts from scratch," are not similar to the threat of retaliation made in Griffith's e-mail. *Plastronics, Inc.*, 233 NLRB 155 (1977). In fact, the Employer did make statements similar to bargaining starting from scratch in other communications that were not objected to by the Union. (Exs. E 10 and E 11).

The Employer relies on *NLRB v. Bostik Division, USM Corp.*, 517 F.2d 971 (6th Cir. 1975), to argue that Griffith's statement was not severe enough to have materially affected the results of the election. The *Bostik Division* case involved alleged statements of threat among coworkers, which the employer unsuccessfully argued should have been the basis to overturn the election. In *Bostik Division*, there was no connection between the statements and the Union. In contrast, Griffith is the employees' direct and ultimate supervisor. The threats Griffith made were squarely within the Employer's control, and the Hearing Officer appropriately applied the relevant factors (discussed below) to determine that the impact of the statements tended to interfere with employee free choice. The Hearing Officer's recommendations regarding Objection 3 are supported by the record evidence and the governing law and should be adopted by this Board.

2. The Hearing Officer correctly determined that Griffith unlawfully promised to grant employees benefits if they voted no in the election.

The Employer excepts to the Hearing Officer's finding that Griffith implicitly promised benefits to the employees by stating in the February 28, 2015, e-mail, "What's the Union rush?? If I haven't done what I say we can do, another Union election can be held in 366 days - - one year and one day following the Thursday election." (Ex. P 2) (Exceptions, 5, 6). The Hearing Officer's finding is supported by the record evidence and governing law, and this Board should

accept the Hearing Officer's recommendation and sustain the portion of Petitioner's Objection 5 relating to Griffith's e-mail.

“The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination.” *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944). “Interference is no less interference because it is accomplished through allurements rather than coercion.” *NLRB v. Crown Can Co.*, 138 F.2d 263, 267 (8th Cir. 1943) (quoting *Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir. 1943)). Promising benefits prior to a union election is no less unlawful, because “[t]he danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

Contrary to the Employer's assertion, the Hearing Officer properly determined that, given the context of the e-mail, Griffith implicitly promised to grant employees benefits if they voted no in the election by questioning the “rush” to select a union and stating that another election could be held “If I haven't done what I say we can do.” (RR, pp. 11-12). In reaching her determination, the Hearing Officer properly relied on *Reno Hilton*, 319 NLRB 1154, 1156 (1995). In *Reno Hilton*, the offending statement was very similar to the instant case:

Hilton has given you all an opportunity to demonstrate your commitment and value. I'm asking you now to give Hilton a chance to show its commitment to you. Vote no...Remember in a year from now you can bring this union, or any other union, in here. But right now, give Hilton and give me a chance, and I'll deliver.

319 NLRB at 1156. This Board in *Reno Hilton* determined that the request for a chance to “deliver,” in the context of earlier references to benefits already bestowed, and in the broader

context of the Employer's other misconduct, would be interpreted by reasonable employees as an implied promise either to grant additional benefits or to remedy employees' grievances, or both. The Hearing Officer properly relied upon *Reno Hilton* because, like in that case, Griffith's statements occurred in the context of an e-mail listing the benefits and favorable terms and conditions of employment the employees currently enjoyed as well as in the context of his threats of retaliation regarding those terms and conditions should the Union be selected. Like in *Reno Hilton*, the Hearing Officer properly determined that Griffith's statements constituted an improper implicit promise of benefits.

The Hearing Officer also properly relied upon *Donald R. Bogard*, 300 NLRB 841 (1990), where this Board found that the Employer's statements such as "Stick with me, things will get better," constituted unlawful promises because they, like Griffith's statements herein, were made in the context of soliciting votes against the Union.

The Employer relies on *National Micronetics, Inc.*, 277 NLRB 993 (1985), where the Board stated that "generalized expressions" "asking for 'another chance' or 'more time,' have been held to be within the limits of permissible campaign propaganda." However, unlike in this case and in *Reno Hilton*, the employer's statements in *National Micronetics* were not made in the context of referencing the current favorable pay, benefits and working conditions the employees enjoyed or in the context of other unlawful conduct. The same is true regarding *Noah's New York Bagels*, 324 NLRB 266 (1997). In that case, the employer's statements were made during a captive audience meeting in which no other unlawful conduct or discussion of employees' current pay, benefits or working conditions occurred.

The Employer's reliance on *Newburg Eggs, Inc.*, 357 NLRB No. 171, 192 LRRM 1477 (2011), is also misplaced. There, the Board found that, while the employer representative

referenced past benefits granted, he clearly did not promise future benefits because he explicitly stated that he was not offering any benefits and that the employer had already given everything it could. Accordingly, the Board found that the employer, through his statements, emphasized that no additional benefits would be forthcoming. The Board distinguished *Newburg Eggs* from *Reno Hilton* because, in *Reno Hilton*, the employer did promise benefits when it stated “give me a chance, and I’ll deliver.” The Hearing Officer correctly determined that Griffith similarly promised benefits when he stated that another election could be held “If I haven’t done what I say we can do.” The Hearing Officer correctly determined that Griffith unlawfully promised benefits to employees in exchange for voting no in the election in his February 28, 2015, e-mail. This Board should adopt the determination and sustain the portion of Objection 5 relating to the e-mail.

3. The Hearing Officer correctly applied the governing law to determine that the Employer’s conduct reasonably tended to interfere with employee free choice and warranted the setting aside of the election.

The Hearing Officer properly determined that the above-referenced conduct by the Employer reasonably tended to interfere with employee free choice and recommended that, should the tally of ballots not favor the Petitioner, the election be set aside and a new election be conducted. This Board should affirm her findings and adopt her recommendations in that regard.

The Hearing Officer set forth the factors to consider regarding whether a party’s conduct has the tendency to interfere with employee free choice as follows:

- (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among employees in the voting unit; (3) the number of employees in the voting unit who were subjected to the misconduct; (4) the proximity of the misconduct to the date of the election; (5) the degree to which the misconduct persists in the minds of employees in the voting unit; (6) the extent of dissemination of the misconduct to employees who were not subjected to the misconduct but who were in the voting unit; (7) the effect (if any) of any misconduct by the [opposing party] to cancel out the effects of the misconduct

alleged in the objections; (8) the closeness of the vote; and (9) the degree to which the misconduct can be attributed to the party against whom objections are filed.

(RR, p. 9) (citing *Taylor Wharton Division*, 336 NLRB 157, 158 (2001)); *Avis Rent-A-Car*, 280 NLRB 580, 581 (1986). These factors overwhelmingly support the Hearing Officer's recommendations with regard to the objections.

With regard to the first factor, although the violations were contained one e-mail, there were two violations contained in the e-mail. Further, as discussed below, the extremely small unit and closeness of the vote demonstrate that even one or two violations can have a significant impact on employee free choice.

With regard to the second factor, the Hearing Officer correctly analyzed the severity of the incidents and whether they were likely to cause fear among employees in the voting unit under the objective standard set forth by this Board. The Employer's argument relies on the faulty premise that the Hearing Officer erred by not speculating as to the subjective impact of Griffith's e-mail on Pfeifer and the other employees eligible to vote. (Exception 4). That simply is not the law. As the Hearing Officer noted, the test is whether the conduct of a party has the "tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co., Inc.*, 316 NLRB 716 (1995). "In determining whether the objecting party has proved the effect of particular conduct on a representation election, we apply the "tendency-to-influence test" rather than speculate about the "subjective reaction of employees to electioneering . . ." *Lake Mary Healthcare Associates, LLC v. NLRB*, 211 Fed. Appx. 878, 880-881 (11th Cir. 2006) (quoting *NLRB v. Golf States Cannery, Inc.*, 585 F.2d 757, 759 (5th Cir. 1978)). The Board's test is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election.

(RR, p. 9) (citing *Baja's Place*, 268 NLRB 868 (1984)).² Further, contrary to the apparent argument of the Employer, the witnesses testified they subjectively perceived Griffith's e-mail to be threatening and intimidating. (Tr. 124, 185, 187).

With regard to the third factor, although only one employee in the unit was subjected to the misconduct, the unit is comprised of only ten to eleven employees. This factor relates to several of the other factors as well. This factor, along with the sixth factor, the extent of dissemination of the misconduct to other employees in the voting unit, demonstrates the substantial impact that Griffith's conduct tended to have on employee free choice. (RR, p. 9). The record evidence demonstrates that information contained in the Griffith e-mail or information about the e-mail was disseminated to six employees in the voting unit. (Tr. 123, 126, 160, 185, 186). That is over half of the employees in the voting unit.

The Employer, in its argument, appears to fault Pfeifer for forwarding the e-mail and otherwise sharing the information in the "highly personal" e-mail from Griffith with her fellow employees. (Brief in Support of Exceptions, p. 9). The Employer's argument directly conflicts with the controlling law. In a case involving twenty-four employees, two of whom were subjected to unlawful conduct, the Board concluded that the election should be set aside in part, because "[w]e have long held that statements made during election campaigns can reasonably be expected to have been disseminated and discussed among the employees." *Super Thrift Mkts.*, 233 NLRB 409 (1977).

Further, the eighth factor, the closeness of the election—one vote—demonstrates how impacting even one voter could have changed the outcome of this election. (RR, p. 9). *NLRB v.*

² *NLRB v. White Knight Mfg. Co.*, 474 F.2d 1064 (5th Cir. 1973), lends no support for the Employer's argument that the Hearing Officer should have engaged in a subjective analysis.

Mr. Porto, Inc., 590 F.2d 637 (6th Cir. 1978), which the Employer cites, favors the Petitioner's argument in support of the Hearing Officer's recommendation. In *Mr. Porto*, the United States Court of Appeals for the Sixth Circuit found that an employee's illegal actions, which were isolated and occurred two months before the election, did tend to affect the election and that the employer had met its burden of showing that the election was unfair. The court's decision was largely due to the fact that only two votes would have changed the outcome of the election. The court found that the narrowness of the vote made the impact of the unlawful conduct more significant. In this case, the vote was even closer, thus *Mr. Porto* demonstrates that the Hearing Officer correctly recommended that the election be set aside based on Griffith's unlawful threat of retaliation and promise of benefits.

Factors four and five of the analysis also support the Hearing Officer's recommendations. (RR, p. 9). The offending e-mail was sent only five days prior to the election and the continuing discussion among the employees demonstrates the degree to which the misconduct would have tended to persist in the minds of the employees in the voting unit. There are no allegations of misconduct by the Petitioner to mitigate the effects of the offending e-mail, so the seventh factor is not applicable. (RR, p. 9). The ninth and final factor also supports the Hearing Officer's recommendations. The misconduct is one hundred percent attributable to the Employer, as Griffith is a high level administrator of the Employer and the employees' direct and ultimate supervisor.

The Employer cites *Cal-West Periodicals Inc.*, 330 NLRB 599 (2000), for the assertion that a single isolated incident does not support the overturning of an election. However, *Cal-West* involved an incident between employees who were not agents of the parties to the election. In contrast, this case involves threat of retaliation and an improper promise of benefits by the voting

unit employees' direct and ultimate supervisor regarding matters within his control. The Hearing Officer properly evaluated all nine factors to conclude that the election should be set aside and a new election ordered if the revised tally of the ballots does not favor the Petitioner.

IV. CONCLUSION

The Hearing Officer's recommendations regarding the Petitioner's objections are supported by the record evidence and the governing law. For the reasons set forth herein and in the Hearing Officer's Report and Recommendations, this Board should find the Employer's exceptions to not be well taken, should adopt the Hearing Officer's recommendations regarding the objections and should set aside the election and order a new election be held should the revised tally of ballots not favor the Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via electronic mail this 4th day of June, 2015, upon Adam Schira, aschira@dickinson-wright.com and via Regular U.S. Mail, postage prepaid, upon Garey Lindsay, Regional Director, John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271

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