

AMERICAN NURSES ASSOCIATION

IN THE MATTER OF:
DISCIPLINARY CHARGES AGAINST
THE NEW YORK STATE NURSES
ASSOCIATION.

APPEAL OF THE HEARING PANEL
DECISION OF DECEMBER 14, 2011

PRELIMINARY STATEMENT

The New York State Nurses Association (“NYSNA”) appeals from the decision of the hearing panel (the “Panel”) appointed by the American Nurses Association (“ANA”) to consider charges filed in November 2011 against NYSNA. On December 13, 2011, the Panel suspended NYSNA’s ANA membership for a one-year period based solely on NYSNA’s decision to appoint Julie Pinkham, who also serves as the Executive Director of the Massachusetts Nurses Association (“MNA”), as NYSNA’s Interim Executive Director. The Panel determined that NYSNA had engaged in “dual unionism” by hiring Ms. Pinkham.

The Panel’s decision was incorrect as a matter of law and unsupported by the evidence presented at the hearing on December 5. There is not a shred of evidence that MNA and NYSNA are rival labor organizations; the Associations have co-existed peacefully for decades, and MNA has never attempted to raid NYSNA or sought to represent any nurses in New York. Additionally, notwithstanding the naked speculation by the Panel to the contrary, the temporary appointment of Ms. Pinkham was not designed to undermine or impact the relationship between NYSNA and ANA. Indeed,

NYSNA has sought to maintain that relationship, while the ANA has taken steps, described more fully below, to destroy it.

Nevertheless, in an effort to resolve this dispute, Ms. Pinkham has advised NYSNA that if ANA agrees to dismiss the charges against NYSNA, lift the suspension retroactive to December 13 and notify NYSNA's members that it has done so, she will resign from her position at MNA while she serves as NYSNA's Interim Executive Director. Ms. Pinkham's offer to resign from MNA should dispel any genuine concerns that ANA might have about Ms. Pinkham's simultaneous employment with MNA and NYSNA. If, however, ANA chooses not to accept this compromise, which would eliminate the entire sole rationale in the Panel's dual unionism decision,¹ then, for the reasons set forth below, it should overturn the Panel's decision and rescind the suspension.

In addition, even if the ANA Board decides to affirm the Panel's decision, it should, at a minimum, modify the penalty the Panel imposed on each and every one of the more than 37,000 individual members of NYSNA. The basis for the Panel's remedy, which strips every individual NYSNA member of all ANA benefits, educational and otherwise, was its incorrect determination that it had no choice but to impose such a penalty. To the contrary, ANA's disciplinary policies vested the Panel, and now vest the ANA Board of Directors, with broad discretion to fashion a remedy, including a remedy that would not impose what, respectfully, is tantamount to collective punishment on the entire NYSNA membership.

¹ Any reference to Steve Toff as a basis for the dual unionism charge is baseless, as Mr. Toff had stopped working for NNU and received no compensation from NNU in connection with the NYSNA election. No evidence to the contrary was presented at the hearing.

It is obvious that the charging parties have pulled ANA into an internal political dispute at NYSNA, a dispute prompted by the overwhelming election victory of a slate of candidates who, together with their incumbent supporters on NYSNA's Board of Directors, now constitute a more than two-thirds majority on the Board. The opponents of the new majority have challenged the election in federal court — completely unsuccessfully — before the United States Department of Labor, and now before the ANA. However, as the Panel acknowledged in its decision, such internal political election disputes are not within ANA's jurisdiction. Indeed, ANA's intrusion into NYSNA's internal politics, like its second-guessing the NYSNA Board's decision about which Executive Director to hire, is unsupportable under ANA's federated model, which supposedly respects the autonomy of its Constituent Member Associations (“CMAs”).

Several procedural issues surrounding this matter must also be addressed. First, NYSNA's members, all of whom have lost representational and other rights in ANA, have been denied basic due process rights which ANA, as a labor organization under the LMRDA, must afford them. Notably, it appears that ANA retained and may have paid for counsel from the ANA General Counsel's former law firm to prosecute the charges against NYSNA. At the same time, ANA General Counsel acted as an advisor to the Panel, and presumably the General Counsel's office will also act as an advisor to the Board on this appeal. Assisting both the prosecutor of the charges and the supposed neutral decision maker would, of course, run afoul of basic due process principles enshrined in the LMRDA. Accordingly, we request that ANA disclose whether it retained and/or compensated counsel to represent the charging parties.

Second, at the inception of this case, NYSNA asked ANA whether any supervisory members on ANA's Board will be participating in this appeal. To date, ANA has failed to respond. Again, NYSNA requests confirmation that no statutory supervisor will participate in the consideration or resolution of this appeal.

Third, there are several ANA Board members who also are NYSNA members — including the NFN President — who are central protagonists in the internal political strife in NYSNA. NYSNA requests confirmation that no NYSNA members will participate in the consideration or resolution of this appeal.

Fourth, the members of the Panel who also sit on ANA's Board, having already decided this case once, can hardly sit as impartial decision-makers on appeal. NYSNA requests confirmation that no members of the Panel will participate in the consideration or resolution of this appeal.

Finally, immediately on the heels of the Panel's decision, and after denying NYSNA's request to stay the Panel's decision to suspend pending the determination of the Board on appeal, ANA did a mailing to NYSNA's members — in violation of a 2008 Agreement between ANA and NYSNA — suggesting that NYSNA's members join another CMA and advising them to demand a refund of the dues that NYSNA pays to ANA. This conduct calls into question ANA's ability to now sit as a neutral appellate body that will afford NYSNA a fair and impartial decision. Additionally, ANA's offer of the individual member option to NYSNA's members, as well as use of NYSNA's mailing list, violate the 2008 Agreement. Accordingly, ANA must cease and desist from utilizing NYSNA's proprietary information, including

NYSNA's mailing list, for the purpose of contacting NYSNA's members for the above-described or any other purpose.

STATEMENT OF THE CASE

The charges of dual unionism were brought by several NYSNA members, including two plaintiffs who are suing NYSNA in federal court on the same grounds as those raised in the charges. The charges principally consist of a potpourri of attacks levied at the winning candidates in NYSNA's recent election and their supporters. ANA is well aware of the undisputed facts in the litigation:

1. The winning candidates in the recent election were overwhelmingly elected by the NYSNA membership;
2. These candidates and their incumbent supporters on NYSNA's Board of Directors now constitute a two-thirds majority of the Board;
3. On October 13, 2011, Judge Richard Sullivan of the United States District Court for the Southern District of New York ruled that the prior Board of Directors, who are supporting the charging parties here, had violated NYSNA's bylaws by failing to declare and seat the winning candidates;
4. Judge Sullivan ordered the former Board to adhere to NYSNA's Bylaws and seat the winning candidates;
5. On October 26, 2011, Judge Sullivan ruled that the prior Board members were in contempt of court for failing to comply with his order; and
6. Only after the Court found the former Board guilty of contempt did they finally defer to the overwhelming and undisputed choice of the NYSNA membership and seat the winning candidates.

7. On December 13, 2011, the day that the ANA Hearing Panel sustained the charges here, the United States Court of Appeals for the Second Circuit of New York denied the prior Board's request to stay Judge Sullivan's order.

The Panel conducted a hearing on December 5, 2011. The charging parties were represented by an attorney, Justin Keating, whom NYSNA understands is one of ANA's outside attorneys, working at the former firm of the ANA General Counsel. NYSNA believes that Mr. Keating was compensated by ANA for such representation. ANA's disciplinary rules do not provide that charging parties are to be provided with counsel at ANA's expense, or that charging parties will be provided with counsel that represents ANA. The notion that ANA retained and paid for the charging parties' counsel and, at the same time, purports to sit as a neutral body on this appeal, is fanciful.

In any event, the hearing testimony focused on the same dispute over NYSNA's election and actions subsequently taken by the Board that have been and continue to be addressed by both the United States Department of Labor and Judge Sullivan. Thus, charging party Donna Florkewicz, who is a plaintiff in a lawsuit brought against NYSNA that is also before Judge Sullivan, when asked what the charging parties were seeking from ANA by bringing the charges against NYSNA, testified that:

Ultimately we are hoping for a rerun election. But as far as the ANA, we just would like your acknowledgement that these board members obtained their seats wrongfully and that they are acting in ways injurious to NYSNA and the ANA. We are not seeking expulsion by any means.

Hearing Transcript at 26.

By decision dated December 14, 2011, the Panel determined that NYSNA had engaged in dual unionism by hiring Ms. Pinkham to serve as interim executive

director. The Panel based its decision on prior disputes between NNU and ANA, none of which had anything to do with Ms. Pinkham, MNA, or NYSNA. Nevertheless, the Panel concluded that it did not have to wait for Ms. Pinkham to take steps to undermine the ANA, and that it was reasonable to conclude that there was something inherently dangerous about the fact that, in her capacity as interim executive director, Ms. Pinkham might misuse information for the benefit of MNA or NNU, to the detriment of NYSNA.

The Panel did not consider that Ms. Pinkham, as a fiduciary under both federal labor and New York corporate law, owes a fiduciary duty to NYSNA that would preclude the use of NYSNA information for the benefit of another organization. In addition, Ms. Pinkham's employment contract with NYSNA provides, among other things, that Ms. Pinkham owes a duty of loyalty to NYSNA.² The Panel also made certain incorrect factual determinations, including that Ms. Pinkham did not have an email address for NYSNA business. In fact, Ms. Pinkham does have a NYSNA mailing address, telephone number, and email address.

The remedy chosen by the Panel was a one-year suspension of NYSNA as an ANA affiliate. The Panel also determined that individual members would not be entitled to any ANA benefits, educational or otherwise. The Panel claimed that it was obligated to impose this collective punishment on the entire NYSNA membership, notwithstanding that the ANA's disciplinary policy expressly vested the Panel with extraordinarily broad remedial authority. In particular, the disciplinary policy provides that the Panel is authorized to impose "**any other appropriate penalty or action.**" (Hearing Exhibit A) (emphasis added). In short, even if the dual unionism determination

² Upon request, NYSNA will provide ANA with a copy of Ms. Pinkham's employment contract, subject to appropriate confidentiality protections.

was meritorious, and it certainly is not, the Panel could have chosen not to impose a remedy directed at each and every one of NYSNA's more than 37,000 individual members.

ARGUMENT

I. NYSNA Has Not Engaged in Dual Unionism

The Panel erred in determining that NYSNA engaged in dual unionism. The sole basis for the determination was that the new Board of Directors hired Ms. Pinkham on an interim basis, and that Ms. Pinkham is the CEO of MNA, which in turn is an affiliate of NNU. At the threshold, MNA and NYSNA are not rival labor organizations. They never have been, and they are not now. Indeed, the Panel acknowledged that there was no evidence that the newly elected Board or Ms. Pinkham was seeking to substitute MNA as the bargaining representative for a single NYSNA member. MNA has never sought to represent nurses in New York. And Ms. Pinkham has spent the better part of her tenure at NYSNA fighting to conclude collective bargaining contracts for more than 15,000 NYSNA members — contracts that the prior administration had failed to close before being voted out of office.

The Panel's decision was premised on the strained notion that comments made by Ms. Pinkham in the past, coupled with prior disputes between MNA's parent NNU and ANA affiliates other than NYSNA, is evidence that the newly elected Board seeks to disaffiliate from ANA. In fact, NYSNA is taking no steps to disaffiliate from the ANA. And the fact that Ms. Pinkham may have been critical of ANA in the past does not establish the contrary.³

³ The fact that Ms. Pinkham has been critical of ANA in the past — a matter well within an individual's free speech rights — does not, as a matter of law, establish dual

Moreover, Ms. Pinkham's employment contract with NYSNA sets forth the duty of loyalty she owes to NYSNA. The employment contract supplements the fiduciary obligation she has to NYSNA under federal labor and New York State corporate law. And it was simply improper for the Panel to have presumed that Ms. Pinkham will violate her employment contract, or state and federal law, and act in the interest of MNA or NNU; indeed, her actions to date — working tirelessly to complete NYSNA's collective bargaining agreements — have demonstrated precisely the opposite.

The Panel, while acknowledging that it had no evidence that Ms. Pinkham or the newly-elected Board had taken any steps to undermine NYSNA's relationship with ANA, nonetheless determined that it could act preemptively to suspend NYSNA and cause injury to more than 37,000 nurses. The Panel drew a strained and erroneous analogy between the circumstances in this case and those involving an internal dispute between the governing board of directors of the Hawaii Nurses Association (HNA) and a programmatic unit of the HNA known as the Collective Bargaining Organization (CBO). The CBO sought to hire members of the California Nurses Association even though it did not have the authority to do so under the HNA bylaws and even though a special master had been appointed by a federal court solely to govern the HNA's daily operations, including hiring and firing employees. In contrast, in this case there is no dispute

unionism. Similar circumstances were directly addressed by the court in *Local 1199 v. Retail, Wholesale and Department Store Union*, 671 F.Supp. 279 (S.D.N.Y. 1987). In that case, as is the case with ANA's Bylaws here, the parent union's constitution addressed the procedural steps that would be necessary for an affiliate to disaffiliate. The court found that the expulsion of members for advocating disaffiliation under such circumstances violated their membership rights under Title I of the LMRDA. Succinctly stated, the court found that where a union constitution permits disaffiliation, taking action against members who seek disaffiliation violates the free speech rights that such members have under the LMRDA. In any event, as stated, Ms. Pinkham has said or done nothing to promote NYSNA's disaffiliation from ANA.

between NYSNA's Board of Directors and any subordinate NYSNA body. It is undisputed that NYSNA's Board of Directors has the absolute authority under the bylaws to hire Ms. Pinkham. ANA's interference with the Board's decision, particularly under ANA's federated model, where CMAs are purportedly afforded autonomy to run their own affairs, is unsupportable.

II. Ms. Pinkham's Offer to Resign From MNA

As stated, in an effort to resolve this dispute, and notwithstanding NYSNA's position that they have not engaged in dual unionism, Ms. Pinkham has offered to resign her position at MNA if the suspension is lifted immediately and retroactive to December 13, if all charges against NYSNA are dismissed, if appropriate notice is provided to the NYSNA membership, and the relationship between the parties is restored to the status quo. Ms. Pinkham's good faith offer should settle this matter and permit the parties to move forward and focus on the needs of the membership.

III. The Remedy is Flawed

The ANA bylaws vested the Panel and vest the ANA Board of Directors with unfettered remedial discretion. Simply put, the Panel was misguided in its determination that it was required to impose a remedy that denies ANA benefits to each and every NYSNA member. Should the ANA Board choose to uphold the Panel's factually and legally baseless decision on dual unionism, it can, and it should, exercise appropriate discretion and fashion a remedy that does not impact on the individual members of NYSNA. At a minimum, an appropriately-tailored remedy should be fashioned as a matter of simple decency and respect for the individual NYNSA members who have nothing at all to do with the internal political dispute underlying these flawed charges.

CONCLUSION

ANA should dismiss the charges for the reasons set forth above.

Alternatively, ANA should exercise appropriate discretion and tailor a remedy that does not unfairly impact on the entire NYSNA membership.

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New York, New York



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