SOUTHEASTERN REGIONAL SCHOOL DISTRICT COMMITTEE AND LOCAL 1849, SOUTHEASTERN REGIONAL TEACHERS FEDERATION, AFT, MUP-2970 (2/2/81). Decision on Appeal of Hearing Officer's Decision.

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Commissioners participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner
Gary D. Altman, Commissioner

Appearances:

Norman Holtz - Representing Southeastern Regional School District Committee

John McMahon - Representing Local 1849, Southeastern Regional Teachers Federation, AFT, AFL-CIO

DECISION ON APPEAL OF HEARING OFFICER'S DECISION

Statement of the Case

On July 25, 1979 Judith A. Wong issued a hearing officer's decision in this matter.[1] She found that the Southeastern Regional School District Committee (Employer) violated Sections 10(a)(1) and (3) of G.L. Chapter 150E (the Law) when it suspended the president and vice-president of Local 1849, Southeastern Teachers Federation, AFT, AFL-CIO (Union) for leading a boycott of an Employer-sponsored parents' night. The Union sponsored another parents' night at a different time and place under its own auspices. The Employer requested a review of Wong's decision by filing a notice of appeal with the full Commission pursuant to MLRC Rules 402 CMR 13.13 and Section 4 of the Law. Supplementary statements were thereafter filed by the parties and have been considered.

Findings of Fact

The facts were stipulated and may be summarized as follows.[2]

[1]The full text of her decision appears at 6 MLC 1317.

[2]The Employer's supplementary statement challenges "the hearing officer's finding of fact that the motivating reasons for the suspensions was the Union's boycott of the parents' night..." This is more appropriately considered as a conclusion or ruling of the hearing officer. We treat it as such infra.

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An "open house" was conducted at the school in 1975, and some teachers voluntarily participated. Other than the events which give rise to the instant case, there were no similar events before or since.

On January 11, 1977 a School Committee member suggested that a parents' night be conducted during the school year. Thesuperintendent responded that it would have to benegotiated, and that he would consult with the Union. The matter was again raised at a School Committee meeting held two weeks later, and Union President Domenic Arena reported that the Union would agree to one parents' night if scheduled by May 30, 1977.

On February 16, the parties commenced negotiations for a collective bargaining agreement to succeed one which was to expire on August 31, 1977. The expiring agreement contained no provision regardingparents' night.

On April 12, 1977 the School Committee voted to establish two parents' nights in 1978. However, no evidence indicates any immediate implementation of that intent.

On November 22, 1977 School Director Kondracki informed the Union that if such an event were planned, he would consult with the Union and ask its cooperation. The next day Kondracki told the Union's president and vice-president that the School Committee wanted to schedule a parents' night in January or April, 1978. He advised them that two half-holidays might be abolished if the teachers did not volunteer. On November 29, 1977 the Union members voted to work only to the letter of the expired agreement until they had a new one. Union representatives advised Kondracki that the climate wasnot good for a parents' night at that time and that there would be no volunteers.

On December 5, a local newspaper published an item concerning the Union's work-to-rule vote, and the following day the Union placed the following advertisement in the Brockton Enterprise:

Residents of the Southeastern
Regional School District

Teachers Withdraw Free Services

NO EXTRAS!

In an overwhelming decision, the professional staff of the Southeastern Regional Vocational Technical High School and Technical Institute has elected to withhold voluntary services to pupils normally performed before and after school. Why?

We have been trying to negotiate for a fair contract since February, 1977!

We have been working without a contract since September 1, 1977!

We have been left with no choice. We have been through mediation and fact-finding. The teachers have accepted the fact-finder's report.

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> The School Committee has rejected the fact-finder's report in its entirety, the report of an independent third party of the School Committee's own choosing. It is the School Committee's demands that are keeping us apart. Contact your regional school committeeman and urge him to resolve this conflict.

The advertisement bore the names of Warren E. Turner and Dominic Arena, who were respectively vice-president and president of the Union.

At a faculty meeting on December 14, Kondracki requested teachers to attend a parents' night in January, 1978. He again stated that it was a real possibility that the teachers would lose two half-holidays if they did not volunteer. He agreed to wait until December 22 for a response.

Two days later Kondracki told Arena and Turner that the School Committee had accelerated the date for a response, and that the Union's response was needed by December 19 rather than December 22. The cnion decided that it need not respond until December 22 as originally agreed. There is no evidence as to what, if any, response was ultimately made.

On January 4, 1978 Kondracki issued a memorandum to the teachers, advising them that the School Committee had scheduled a parents' night on January 11, 1978, and expressing the "hope" that the faculty would be "fully represented."

On January 7, 1978 Arena wrote a letter to the parents of the pupils which stated, inter alia:

> Due to the ongoing contract dispute, the Southeastern regional teachers voted not to honor a parents' night sponsored by the School Committee on January 11. The teachers recognize their obligations to the students and will be holding parent-teacher conferences on January 17 at the Knights of Columbus Hall....
>
> The Southeastern regional teachers have been working without a contract since September 1, 1977.

On January 10, the Brockton Enterprise published a story which headlined the intended boycott and informed the public that the Union was holding its own parents' night. The next day the following memorandum was distributed to each teacher:

> The following motion was passed by the School Committee last night.
>
> Moved that the following notice be placed in the mailboxes of every teacher tomorrow morning:
>
> It has been reported in the local media that the Southeastern Regional Teachers Federation, Local 1849, AFT, intends to conduct an alternative parents' night at the Knights of Columbus facility in Easton on January 17, 1978. It also appears that the Federation has sent letters directly to parents inviting them to attend.

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> The Southeastern Regional School District Committee under law runs this school system. As part of its responsibility, the Committee decides whether, where and when to hold such functions.
>
> In addition, the Federation has actively induced and encouraged teachers to boycott the parent night scheduled by the School Committee.
>
> These actions are utterly irresponsible.
>
> Those individuals who have encouraged these actions or who participate in them share in this irresponsibility and will be subject to appropriate action.

Approximately 30 parents attended the January 11 parents' night, but no teachers participated. The Union conducted informational picketing at the school's site.

On January 12, the superintendent issued four-day suspensions to Arena and Turner. No other employees were disciplined. The letters of suspension read as follows:

> You conduct in sponsoring an alternative parents' night at the Knights of Columbus facility next Tuesday, January 17, 1978, is professionally irresponsible. It usurps the authority of the Southeastern Regional School District Committee, conferred by law to operate the Southeastern Regional Vocational Technical School. Your communication to the media in furtherance of this event is also irresponsible.
>
> Your conduct is deemed to be adequate to suspend you from your job without pay or benefits for four days. Your suspension will be effective January 13, 17, 18 and 19, 1978.
>
> In taking this action, all other rights which the Committee or the administration have to deal with this and any other similar conduct, are, of course, reserved.

The parties concluded negotiations for a successor agreement on March 28, 1978. The new agreement contained a clause providing for teachers' attendance at two parents' nights each year.

Opinion

The Union alleges that Arena and Turner were suspended in retaliation for their protected activity, specifically, organizing the boycott of the School Committee's Parents' Night, planning a Union-sponsored parents' night, and making public statements concerning the collective bargaining dispute. The hearingofficer found that the suspensions were motivated solely in response to the boycott, that the boycott was protected by Section 2 of the Law, and that the suspensions were therefore illegal. The School Committee contends that the boycott and the alternative parents' night are inextricably interwoven, that both activities are unprotected (and that the boycott

constituted an illegal strike), and that the suspensions should be upheld. Furthermore, argues the School Committee, even if the boycott were protected, the dominant reason for the suspensions was the sponsorship of the alternative night.

We agree with the School Committee that the sponsorship of the alternative parents' night played at least a substantial part in the discipline decision. For the reasons that follow, however, we hold that both the boycott and the alternative night constituted protected activities, rendering the suspensions illegal.

We think it clear that the School Committee considered the alternative night to be an utterly reprehensible usurpation of its authority to manage the school system. The School Committee's January 11 memorandum to all teachers was primarily concerned with the alternative night, and the suspension letters spoke only of the alternative night, not the boycott. We are unable to conclude, however, that the alternative night supplied the dominant motive for the suspensions. As the School Committee wrote on appeal, "(T)he two activities are not disparate and disjointed; they are interwoven to the extent that one cannot be understood in context without reference to the other." We question whether the School Committee would have been so outraged by the alternative night had not the Union been so completely successful in boycotting the official parents' night. Were we to find the boycott to be protected and the alternative unprotected, this case would present a complicated mixed motive question. The question need not be addressed, however, as we find both activities to be protected.

a. The Boycott

In Lenox School Committee, 7 MLC _____, MUP-3229 (December 10, 1980), we had occasion to consider whether certain limited job actions, undertaken by employees to further the negotiation of a collective bargaining agreement, constituted strikes as defined in Section 1 of the Law and proscribed by Section 9A(a). We held that:

> "duties of employment," abstinence in whole or in part from which constitutes a strike, include not only those duties specifically mentioned in existing or recently expired collective bargaining agreements (or personnel policies in effect for more than one year), but also those practices not unique to individual employees which are intrinsic to the position or which have been performed by employees as a group on a consistent basis over a sustained period of time.

We further held that:

> a withholding of services, engaged in by employees in furtherance of their collective bargaining goals, which is not prohibited by Section 1 of the Law, would gain the protections of Section 2, subject to the normal constraints that the action not be violent, unlawful, in breach of the contract, or indefensibly disloyal. (emphasis in original).

The expired collective bargaining agreement between the Union and the School Committee is silent on the issue of attendance at parents' nights. Furthermore, only once before, in 1975, had an event resembling a parents' night occurred and, according to

the stipulated facts, "some teachers participated on a voluntary basis." Under these circumstances, we cannot say that the boycott of the School Committee Parents' Night constituted abstinence in whole or in part from a duty of employment. Thus, the boycott was not an illegal strike. Moreover, the boycott was concerted action in an effort to secure a collective bargaining agreement. Inasmuch as it does not fall within the proscriptions cited above, the boycott was protected by Section 2 of the Law.[3] Lenox School Committee, supra.

b. The Alternative Parents' Night

The School Committee argues that the scheduling of the alternative Parents' Night was unlawful and improper, and therefore unprotected.[4] The School Committee contends that G.L. c.71 grants to school committees power to run the schools and to establish an educational program for students. The School Committee posits that only it has the authority to schedule and conduct a parents' night, and that the teachers, by scheduling their own parents' night, were acting within thesphere of their official authority and operating under color of their authority as public officials, all in denigration of the School Committee's authority under Chapter 71. The sponsorship of the alternative night was made all the more egregious, in the view of the School Committee, by the fact that its scheduling was communicated directly to the parents, an invitation at war with the School Committee's notion that "teachers have direct contact with parents only under special circumstances and then only as the agents of the School Committee."

We may dispose of the latter contention at the outset. While we would be troubled were employees to abuse their official positions to achieve their own political ends with respect to collective bargaining, the broad proposition advanced by the School Committee, if applied to the teachers, would be an unwarranted restriction on the First Amendment right of free speech. While the exercise of the right of free speech is not unlimited,[5] employees retain a wide range of action outside of the classroom. The School Committee's argument is even more unavailing on the facts of this case, where the communications to parents came from the Union, not the individual

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[3]This case presents only the question of whether the boycott was protected activity. We need not determine whether the other aspects of the Union's "no extras" campaign are protected.

[4]The suspensions were assessed in part for the "sponsorship" of the alternative night before the event was held; indeed, the record does not indicate if the alternative night ever occurred. Given our conclusion that the alternative night was protected, we need not reach the question of whether, under G.L. c.150E, an employee may be disciplined for threatening to engage in activity not illegal but not protected.

[5]See, for example, New England Medical Center Hospital, MLRC No. UP-2209 (1973); NLRB v. IBEW, 346 U.S.464, 33 LRRM 2183 (1953); Maryland Drydock Co. v. NLRB, 185 F.2d 538, 25 LRRM 1471 (4th Cir. 1950); Emerson Electric Co., 185 NLRB No.71, 75 LRRM 1028 (1970).

teachers. There can be no claim of attempting to proselytize under color of official authority. We will not restrict the Union's right of free speech under a theory applicable at best only to the employees.

We turn then to the School Committee's major contention that the scheduling of the parents' night was unprotected as a usurpation of the School Committee's authority. We assume for the purposes of this decision that, in fact, the event occurred as planned. The scheduling of the alternative parents' night meets the threshhold requirements for protection under Section 2 of the Law. It arose as part of a labor dispute involving group interest, namely, achieving a new collective bargaining agreement. However, it has long been recognized that concerted activity may lose its protection if it is unlawful, violent, or in breach of a contract. See Lenox, supra. There is an additional exception, variously articulated, which denies protection to activities characterized as "indefensibly disloyal." See NLRB v. Washington Aluminum Co., 370 U.S.9, 50 LRRM 2235 (1962). The School Committee cites no case law in support of its proposition that the scheduling of the alternative parents' night is somehow unlawful or improper. We have, however, canvassed the cases of the National Labor Relations Board (Board) and federal courts for guidance.

We can find no support for the argument that the alternative parents' night is unlawful. Typically, this claim arises when the union is seeking an agreement which is itself unlawful, for instance, recognition of a minority union; or where the union is using tactics declared unlawful by the NLRA,[6] such as a secondary boycott; or where the union is using tactics unlawful for some other reason, such as violence or extortion. Obviously, none of these examples apply here. The closest federal parallel revealed by our research arose in Southern Steamship Co. v. NLRB, 316 U.S.31, 10 LRRM 544 (1942), where employees on board ship in port struck and refused to follow orders. The Supreme Court noted that the Board should seek to accommodate the NLRA to other important Congressional objectives. The Court held that the federal mutiny statutes were sufficiently important to override protection otherwise offered under the NLRA. The concern of the School Committee that it manage the public schools pursuant to G.L. c.71, while understandable, does not compare to the concerns of the federal mutiny statutes as enunciated by the Supreme Court. We note that even in Southern Steamship four justices on the Court dissented.

We turn then to the School Commitee's claim that the alternative parents' night was in some other way improper or indefensible. Necessary to the analysis of this claim is an understanding of the context in which such an activity occurs. There are some important differences between the public sector and the private sector. While the bargaining model developed in the private sector functions reasonably well in the public sector for run-of-the-mill contract administration problems and the early stages of contract bargaining, significant differences become apparent when the parties reach impasse or some comparable crisis point. The strikeis not a weapon available to employees to force bargaining concessions. It is illegal and, even when undertaken, affects public employers far differently than in the private sector, for there is no profit motive at stake. Rather, public sector bargaining is inherently a political process, and public employers--selectmen, school committeemen, mayors--respond

[6]National Labor Relations Act, as amended, 29 U.S.C.151 et seq.

not to economic pressures but to political pressures. They must decide what services to offer at what cost. They must bear the brunt of increased tax rates or decreased services, and balance the needs of their several electoral constituencies. The unions, of course, must heed these forces as well. They must try to mount public support for their position, knowing that it may not come easily when higher taxes may be in the offing. They must convince the electorate that the employees earn their day's pay.

With this in mind, the scheduling of the alternative parents' night is an understandable tactic. It undercuts the notion that the teachers are shirkers, always intent on increasing wages and decreasing work. The teachers must demonstrate their professional concern for the students. They must make the public believe that they deserve the contract that they are seeking. They take a risk in that their refusal to do "extra work" may foster a negative impression.

Thus, we see the alternative parents' night as intimately connected with the Union's collective bargaining goals. The question is whether this concerted activity loses the protection of the statute by being somehow indefensible. The Board, the federal courts and this Commission have allwoed employees broad latitude in engaging in concerted action to pressure an employer to make concessions. As the Supreme Court said in NLRB v. Insurance Agents Intl. Union, 361 U.S.477, 45 LRRM 2704 (1960), union tactics are not to be proscribed merely because they are unconventional. However, it is recognized that employees, particularly those who remain on the payroll, owe a degree of loyalty to the employer, and employees who are "disloyal" lose the protections of the law. Although the Board and Courts have articulated a wide variety of theories in defining unprotected disloyalty, three strains of cases may be identified.

Most common is the situation where an employee is engaged in protected activity, perhaps in handling a grievance or on the shop floor. While an employee may be allowed a moment of "animal exuberance" Bettcher Mfg. Corp., 76 NLRB 526, 21 LRRM 1222 (1948), protection may be lost if his conduct becomes personally abusive or physically intimidating. See City of Boston, 7 MLC 1216 (1980) and cases cited therein. Similarly, the employee loses his statutory protection if his conduct substantially disrupts the employer's ability to maintain order and discipline. Compare J.P. Stevens & Co., 219 NLRB 850, 89 LRRM 1814 (1975), enf'd., 547 F.2d 792, 93 LRRM 2262 (4th Cir. 1976), and Precision Industrial Products Co., 215 NRLB 51, 83 LRRM 1500 (1973), enf. den. 500 F.2d 6, 86 LRRM 2963 (8th Cir. 1974). In the present case, there is no suggestion that Union adherents ever became abusive or threatening, or that the alternative night substantially disrupted any School Committee programs. Compare Southern Worcester County Regional Vocational School Committee, 2 MLC 1488 (1976).

The second strain of cases involves job actions, most commonly partial or intermittent strikes. The Board and some Circuit Courts of Appeals have withheld protection for job actions which "unreasonably interfere with the employer without placing any commensurate economic burden on the employees," Shelley & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200, 86 LRRM 2619 (9th Cir. 1974), or which amount to an arrogation of the employer's right to run the enterprise, Honolulu Rapid Transit Co., 110 NLRB 1806, 35 LRRM 1305 (1954). In a variation on this theme, job actions which threaten substantial damage to the employer's plant or equipment have been deemed too irresponsible to be protected. NLRB v. Marshall Car Wheel Co., 218 F.2d 409, 35 LRRM 2320 (5th Cir. 1955). These cases may be generally characterized as attempts by the Board

and courts to discourage undue disruption, and are applicable only where the disruption is so extreme as to amount to disloyalty.[7] The alternative night falls far short of disloyal disruption. The School Committee could hardly have complained had the teachers chosen to demonstrate their concern for the students by announcing that, "as always," the teachers are willing to meet with the parents or talk on the telephone at any reasonable time. Where we have held the boycott to be protected, we cannot say that the provision of the boycotted services in another setting is so disruptive to the employer as to outweigh the legitimate bargaining concerns of the employees. Nor can we find any support for the notion that the sponsorship of the alternative night has affected the long-range ability of the Committee to manage the school system.

The third strain of disloyalty cases concerns public attacks on the employer by the union. The seminal disloyalty case is NLRB v. IBEW, Local 1229, the so-called Jefferson Standard case. There, the employees, during their off-duty hours, distributed to the public leaflets sharply critical of the employer broadcasting company's programming. These leaflets were likely to cause a dimunition in audience and/or a decline in advertising revenues. The Board found the technicians' actions to be "hardly less indefensible than acts of physical sabotage." The Supreme Court appeared to require more in finding the activities to be unprotected, deeming it important that employees were still on the company payroll and that the leaflets made no reference to the labor dispute, hence, removing the possibility that the leafleting campaign could redound to the benefit of the employees by way of increased public support. Thus, to the court, the leaflets were disloyalty pure and simple. See Roanoke Hospital, 220 NLRB 217, 90 LRRM 1440 (1975), enf'd. 538 F.2d 607, 92 LRRM 3158 (4th Cir. 1974) (employee's public statements protesting hospital staffing levels were held protected because sufficiently related to the employees' claim that wages were too low.) See also, Firestone Tire & Rubber Co., 238 NLRB No.186, 99 LRRM 1429 (1978). Neither the fact of the alternative night nor the public statements surrounding it can be considered disloyal disparagement of the School Committee's "product." The Union did not challenge the educational judgment of the School Committee as to what forms of parent-teacher communication were appropriate; rather, it has chosen a vehicle substantially similar to the Committee proposal. The protest was tied directly to the collective bargaining dispute, so the public could hardly be confused as to the Union's motives. The public statements were not riddled with the invective and ridicule which has sometimes cost an employee protected status. See, e.g., American Arbitration Association, 233 NLRB No.12, 96 LRRM 1431 (1977).

No reason for denying protection of the Law appears in this case. Rather, the Union's tactic was simply part of a plan to increase public support in its labor dispute and to put pressure on the employer to reach an agreement. The teachers, by boycotting the official parents' night and scheduling their own, were sending a signal that they were willing to work for their money, but that the employer could not expect additional labor from the teachers without going through the processes prescribed by law, namely, negotiating and executing a collective bargaining agreement. The teachers' activities were protected by Section 2 of the Law.

[7] We note that the Supreme Court has cautioned against taking this approach too far. NLRB v. Washington Aluminum Co., supra.

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c. Conclusions of Law

The School Committee suspended Union President Arena and Vice-President Turner in response to the Union's boycott of the School Committee's Parents' Night and the scheduling by the Union of an alternative parents' night.[8] We find those activities to be protected by Section 2 of the Law, and the suspensions therefore violate Sections 10(a)(3) and (1) of the Law.

ORDER

WHEREFORE, on the basis of the foregoing, IT IS HEREBY ORDERED pursuant to G.L. Chapter 150E, Section 11, that the Southeastern Regional School District Committee and its agents shall:

1. Cease and desist from:

   a. Discriminating against Warrent Turner and Domenic Arena for their activities on behalf of Local 1849, Southeastern Teachers Federation, AFT, AFL-CIO;

   b. Discriminating in regard to hiring, tenure or any term or condition of employment to encourage or discourage membership in any employee organization;

   c. Interfering with, restraining, or coercing employees in the exercise of any right guaranteed under the Law.

2. Take the following affirmative action which it is found will effectuate the policies and purposes of G.L. c.150E:

   a. Remove from Warren Turner's and Domenic Arena's personnel files any record of the suspensions that were in effect from January 13, 1978 to January 19, 1978;

   b. Make Warren Turner and Domenic Arena whole for any loss of pay that resulted from these suspensions, with interest at the rate of ten percent (10%) per annum;

   c. Restore to Warren Turner and Domenic Arena all rights, privileges, and benefits that they lost as a consequence of these suspensions, including seniority rights;

   d. Preserve and, upon request, make available to the Commission or its agents for examination and copying, all payroll records, time

[8] The letter of suspension also refers to their "irresponsible" communication to the media of the alternative night. Inasmuch as we find the alternative night to be protected, and the public statements were not objectionable in any other way, the statements are protected as well.

e. Post the attached Notice in a conspicuous place where employees regularly congregate or where notices to employees are usually posted and allow the Notice to remain posted for a period of thirty (30) days;

f. Notify the Commission in writing within ten (10) days of the service of this Decision and Order of the steps taken to comply herewith.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman
JOAN G. DOLAN, Commissioner
GARY D. ALTMAN, Commissioner

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NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

The Massachusetts Labor Relations Commission in a decision dated found that the Southeastern Regional School District Committee committed a prohibited practice in violation of Sections 10(a)(1) and (3) of the General Laws, Chapter 150E.

Chapter 150E of the General Laws gives public employees the following rights:

To engage in self-organization,
To form, join or assist any union,
To bargain collectively through representatives of their own choosing,
To act together for the purpose of collective bargaining or other mutual aid or protection,
To refrain from all of the above.

WE WILL NOT interfere with, restrain or coerce any employee in the exercise of any rights guaranteed under this chapter.

WE WILL NOT by suspension or any other like or related means, discriminate against any employee or other person in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization.

WE WILL remove from the personnel files of Warren Turner and Domenic Arena any record of the suspensions that were in effect from January 13, 1978 to January 19, 1978.

WE WILL make Warren Turner and Domenic Arena whole for any loss of pay that resulted from these suspensions with interest at the rate of ten percent (10%) per annum.

WE WILL restore to WArren Turner and Domenic Arena all rights, privileges, and benefits that they lost as a consequence of these suspensions.

DATED

Chairperson, Southeastern Regional School District Committee