LUTHER E. ALLEN, JR. AND ALLIANCE, AFSCME/SEIU, AFL-CIO AND ANTHONY L. ROBINSON AND ALLIANCE, AFSCME/AFL-CIO, SUPL-2024 AND SUPL-2025 (11/13/81).

(70 Union Administration and Prohibited Practices)
75.2 election of officers

Commissioners participating:

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

Appearances:

Joseph G. Sandulli, Esq.	- Counsel for Alliance, AFSCME/SEIU, AFL-CIO
Anthony L. Robinson	- Representative for Anthony L. Robinson and Luther E. Allen, Jr.

DECISION

Statement of the Case

This case deals with a public employee union's right to determine eligibility requirements for election to union office.

On October 7, 1976, Luther E. Allen, Jr., and Anthony L. Robinson filed charges with the Labor Relations Commission (Commission) alleging that the Alliance, AFSCME/SEIU, AFL-CIO (Alliance or Union) had engaged in prohibited practices within the meaning of Section10(b)(1) of Chapter 150E of the General Laws (Law).

After preliminary investigation the Commission issued a consolidated Complaint of Prohibited Practice on January 31, 1977 alleging that the Alliance had advised its members that only persons who had fully participated in the Alliance strike of June, 1976, would be eligible for nomination and election as union steward. The Complaint further alleged that as a result of this eligibility limitation Anthony L. Robinson was precluded from running for the position of union shop steward and voting for the union steward of his choice, and that Luther E. Allen, Jr., was precluded from voting for the union steward of his choice, all in violation of Section 10(b)(1) of the Law.

On March 2, 1977, an expedited hearing on these consolidated cases was held before Phillip J. Dunn, a duly designated hearing officer of the Commission. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and brief the issues. The Alliance did file a brief and it has been duly considered. On April 19, 1977, the Commission redesignated these cases for formal Commission decision. Upon the entire record, we make the following findings and conclude that the Alliance has violated the Law.

Jurisdictional Findings

The Alliance, AFSCME/SEIU, AFL-CIO, is an employee organization within the meaning of Section 1 of the Law, and at all times material to this case was the

exclusive bargaining representative of certain employees of the Commonwealth of Massachusetts, including Luther E. Allen, Jr. and Anthony L. Robinson.[1]

Luther E. Allen, Jr., and Anthony L. Robinson are public employees within the meaning of Section 1 of the Law, and are represented by the Alliance.

Findings of Fact

Allen and Robinson were employed by the Massachusetts Commission Against Discrimination during June of 1976[2] when certain Commonwealth employees engaged in a three-day strike. The Commission investigated the work stoppage and determined that "the Alliance did condone and encourage a strike by its members against the Commonwealth." See, Interim Order, Commonwealth of Massachusetts; Commissioner of Administration and Finance and Alliance, AFSCME/SEIU, AFL-CIO, SI-19 (June 17, 1976). On June 21, the Suffolk County Superior Court issued a restraining order against the Alliance, its members, and persons represented by it prohibiting them from engaging in the strike, which violated Section 9A(a) of the Law. Neither Allen nor Robinson participated in the strike.

On October 1, a notice of an election for union office was posted by the Alliance which stated, in relevant part, that:

> Only persons...who participated fully in the three-day strike of State employees will be eligible to run for steward.

The election was to take place on October 7. After reading the notice of election, Allen, on behalf of himself and Robinson, contacted Ms. Beth Reisen, the Alliance representative, to question her about the legality of conditioning candidacy for shop steward on participation in the June strike. Reisen told Allen that neither the union constitution nor the Union by-Laws addressed the issue, rather that the limitations on candidacy were a matter of unwritten Alliance policy. Allen related this conversation to Robinson. Nevertheless, Robinson still sought to have his name submitted as a candidate for steward in the election. However, representatives of the Alliance issued a list of candidates and Robinson's name was not included on the list.

The election was held as scheduled on October 7 and Robinson, though not on the ballot, received two votes for the position of steward. The parties agree that Allen told Reisen at the time he cast his ballot that he was voting under protest.

Allen had attended Alliance meetings prior to the election, but neither he nor Robinson raised the issue of qualifications for the steward's position with the general membership or with Alliance officials other than Reisen. On the day of the election, Reisen told Allen that he had "a right to file a complaint," but

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[1] Prior to the date of this decision, the Alliance ceased being the exclusive bargaining representative of the employees in question.

[2] All dates refer to 1976 unless otherwise specified.

Luther E. Allen, Jr. and Alliance, AFSCME/SEIU, AFL-CIO and Anthony L. Robinson and Alliance, AFSCME/AFL-CIO, 8 MLC 1518

Allen did not further pursue any internal grievance mechanism.

Opinion

An analysis of this case, which is one of first impression for the Commission, requires that we examine the statutory rights of public employees as well as the public policy prohibiting strikes. Against these concerns we must balance the legitimate discretion that must be afforded to public employee unions to manage their internal affairs.

Section 2 of the Law guarantees to employees the right "to engage in lawful, concerted activity for the purpose of collective bargaining or other mutual aid or protection," and the correlative "right to refrain from any or all of such activities...." Although the Law speaks only in terms of lawful concerted activity, common sense requires the conclusion that public employees are statutorily protected in refraining from unlawful concerted activity, such as participation in a strike.

Section 10(b)(1) of the Law provides that it shall be a prohibited practice for an employee organization or its designated agent to "interfere, restrain, or coerce any...employee in the exercise of any right guaranteed under this chapter."

The issue in this case is whether the Alliance unlawfully interfered with, restrained or coerced Allen and Robinson by its policy of refusing nomination and election to the position of steward to members sho had not participated in the illegal June strike.[3] Federal precedent under the National Labor Relations Act (NLRA) provides some guidance in resolving this issue.

The NLRA, like c.150E, guarantees to employees the right to refrain from concerted activity[4] and makes it an unfair labor practice for a union to interfere

[3]The Alliance has argued that the charges should be dismissed because Allen and Robinson failed to exhaust internal union remedies. However, we do not find that there was an obligation to exhaust whatever avenues there may have been in this case where the policy notice was posted only six days before the election. Moreover, the Alliance's claim to an exhaustion requirement relies upon an article of the constitution and by-laws of Service Employees International Union (a member of the Alliance) which refer to cases where disciplinary action is taken against an "accused" employee. The Alliance has failed to show that there was an internal grievance mechanism available to Allen and Robinson or that such a mechanism could have been a reasonable recourse given the compressed time period between the policy announcement and the election.

[4]Section 7 of the NLRA provides:

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activitiy for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement

(footnote continued on following page)

Luther E. Allen, Jr. and Alliance, AFSCME/SEIU, AFL-CIO and Anthony L. Robinson and Alliance, AFSCME/AFL-CIO, 8 MLC 1518

with these rights.[5] Unlike c.150E, the NLRA specifically qualifies the prohibition against interference with employees' concerted rights:

> Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein.

This proviso[6] has been interpreted broadly by the Supreme Court, which stated that "Congress did not propose any limitation with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status." N.L.R.B. v. Allis Chalmers Mfg. Co., 388 U.S. 175, 65 LRRM 2449, 2457 (1967).

In Allis Chalmers, the union had fined members who had crossed a picket line during the course of a lawful economic strike, in contravention of a union rule. The Court upheld the fines, finding that unions have the power to protect against erosion of their status through reasonable rules and regulations. That power, the Court concluded,

> is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and 'the power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent....' Provisions in union constitutions and by-laws for fines and expulsion of recalcitrants, including strike breakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments. Allis Chalmers, supra, 65 LRRM at 2451. (Citations omitted).
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> (quoted in: Summers, "Legal Limitations on Union Discipline," 69 Harv L. Rev. 1049 (1951) at 1049.)

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[4](footnote continued from previous page)
requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

[5]Section 8(b)(1)(A) of the NLRA provides in part:

It shall be an unfair labor practice for a labor organization or its agents -
(a) to refrain or coerce
(A) employees in the exercise of the rights guaranteed in Section 7.

[6]We believe that the intent and reasoning of such a proviso are implcit in Section 10(b)(1) of the Law. There is nothing in c.150E to suggest that the Commission should, as a regular matter, become involved in overseeing purely internal union affairs. Of course, the Commission does have jurisdiction over issues pertaining to the agency service fee provisions of Section 12 and the filing requirements of Sections 13 and 14.

Luther E. Allen, Jr. and Alliance, AFSCME/SEIU, AFL-CIO and Anthony L. Robinson and Alliance, AFSCME/AFL-CIO, 8 MLC 1518

If the three-day Alliance strike in June were lawful under c.150E, we would be persuaded that the Allis Chalmers rule should apply and that, by analogy, it would be permissible for the Alliance to condition the holding of union office on participation in a strike.

However, the present case presents a different situation since strikes are unlawful under the Law. More applicable as precedent are instances where union members have been penalized for refusing to engage in activity which was unlawful for one or more reasons.[7] In these cases the NLRB and the Courts are concerned with whether a union rule or disciplinary measure "reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule." Scofield v. NLRB, 394 U.S. 423, 70 LRRM 3105, 3108 (1969).

Instances involving union discipline of members refusing to honor illegal picket lines are most on point.

In Local 12419, Mine Workers, 176 NLRB No. 89, 71 LRRM 1311 (1969), the NLRB found that a union had violated Section 8(b)(1)(A) of the NLRA by fining members who had crossed the picket line of another union which their own union had chosen to honor. In so honoring the other union's picket line, however, Local 12419 was itself in violation of a contractual no-strike clause with its employer.

Based upon these facts the Board stated:

> To hold that a union, despite the prohibition in Section 8(b)(1)(A) against restraining or coercing of employees in their rights under Section 7, could nevertheless with impunity penalize members for failing or refusing to participate in a violation of a no-strike clause is to provide an incentive to unions and members to violate contracts. This runs counter to a basic policy of the statute. 176 NLRB at 632.

Affirming an NLRB decision in a similar case, the Ninth Circuit Court of Appeals was of the opinion that "disciplinary action" limited only to denial of union membership is coercive and unlawful. NLRB v. Retail Clerks Local 1179,

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[7]Another line of cases under the NLRA involves access to National Labor Relations Board processes. The Supreme Court has held that a union violates Section 8(b)(1)(A) when, in the guise of enforcing its own rules, it expels a member for filing charges against it with the Board. NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, 391 U.S. 418, 68 LRRM 2257 (1968). The Court's reasoning was based upon what it saw as an overriding national interest in maintaining unimpeded access of individuals to the NLRB's processes. This policy has been applied as well to cases involving the removal of a steward from office. Sheet Metal Workers, Local 204, 246 NLRB No. 50, 102 LRRM 1503 (1979) (the union removed a steward who advised a discharged employee to file an unfair labor practice charge against the union for refusing to press the discharge grievance).

Luther E. Allen, Jr. and Alliance, AFSCME/SEIU, AFL-CIO and Anthony L. Robinson and Alliance, AFSCME/AFL-CIO, 8 MLC 1518

526 F.2d 142, 90 LRRM 3240, 3242 (9th Cir. 1975). Accord, Communications Workers Local 1104, 211 NLRB 114, 87 LRRM 1253 (1974), aff'd 520 F.2d 411, 89 LRRM 3028 (2nd Cir. 1975). But see NLRB v. IUOE, Local 18, 503 F.2d 780, 87 LRRM 2392 (6th Cir. 1974).

Most of the federal cases involving union rules on eligibility requirements for union office are based upon Section 401(e) of the Labor Management Reporting and Disclosure Act (LMRDA)[8] which is aimed at ensuring free and democratic union elections. See, e.g., Steelworkers Local 3489 v. Usery, 429 U.S. 305, 94 LRRM 2203 (1977) (union's meeting attendance rule requiring candidate for office to attend at least half of the union's meetings for a three-eyar period preceding election was an unreasonable qualification for office in contravention of Section 401(e)); Marshall v. ILA, Local 142, 105 LRRM 2694 (5th Cir. 1980). There is, of course, no Massachusetts statute equivalent to the LMRDA, and we do not base our decision in this case on any "reasonableness" requirement regarding internal union affairs which we are reading into c.150E.

Rather, we base our finding of a violation by the Alliance on policy considerations similar to those described in Local 12419, Mine Workers, supra.

In so doing, we recognize the interests of the Alliance, real and substantial as they are, of ensuring the unqualified support and loyalty of union officers. We further recognize that the establishment of standards for eligibility for union office is, at a general matter, a peculiarly internal union concern beyond the control of the Commission.

[8]That section provides as follows:

> (e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement, shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

Luther E. Allen, Jr. and Alliance, AFSCME/SEIU, AFL-CIO and Anthony L. Robinson and Alliance, AFSCME/AFL-CIO, 8 MLC 1518

However, in the present case we find that the Alliance's rule impairs the policy against strikes by public employees imbedded in Section 9A(a) of the Law by disciplining members for their refusal to participate in such activities. The public policy embodied in Section 9A(a) is clear: "no public employee or employee organization shall engage in a strike, and no public employee or employee organization shall induce, encourage or condone any strike...." Allen and Robinson were precluded from participation in the Alliance election because of their failure to "participate fully in the three-day strike of State employees," a protected activity on their part. We hold that, because the Union rule in question, whether construed retrospectively as applying to Allen and Robinson, or prospectively as it may influence other Alliance members in their decision to either obey or disobey the Law, impairs a policy that the General Court imbedded in the Law, the rule falls outside the legitimate domain of internal union affirs.

Therefore, the Alliance has violated Section 10(b)(1) of the Law by conditioning nomination and election for union office on participation in the June 1976 strike.

ORDER

Wherefore, it is hereby ordered that:

The Alliance shall:

1. Cease and desist from conditioning eligibility for nomination or election to union office on employee participation in illegal strikes or work stoppages or in any like or similar manner interfering with, restraining and coercing employees in the exercise of their rights under the Law.

2. Take the following affirmative actions which will effectuate the purposes of the Law:

   a) Post in conspicuous places where notices to employees represented by the Alliance are usually posted and leave posted for not less than thirty (30) days the attached Notice to Employees:

   b) Notify the Commission within ten (10) days of receipt of this decision and order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

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

Luther E. Allen, Jr. and Alliance, AFSCME/SEIU, AFL-CIO and Anthony L. Robinson and Alliance, AFSCME/AFL-CIO, 8 MLC 1518

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

The Massachusetts Labor Relations Commission has found that the Alliance violated Section 10(b)(1) of G.L. c.150E when it conditioned eligibility for nomination and election to the position of union steward on participation in the three-day June 1976 strike.

WE WILL NOT in the future promulgate any rule or regulation or issue any written or unwritten policy which conditions eligibility for union office on participation in an illegal work stoppage.

NOTICE OF APPEAL RIGHTS

Effective July 1, 1981, appeals of Labor Relations Commission final decisions under M.G.L. c.150E are heard in the first instance in the Appeals Court.

The Commission's understanding of the procedure which is to be followed in such an appeal is:

1. The party appealing the decision files a Notice of Appeal with the Commission within thirty (30) days of receipt of the decision.

2. The Commission assembles the administrative record and files with the Appeals Court a certified list of documents which constitute the record. Notice of Assembly of the Record is served on the parties by the Commission. (See M.R.A.P. 9)

3. Within ten (10) days after receipt of the Notice of the Assembly of the Record, the appealing party must docket the case in the Appeals Court. (See M.R.A.P. 10)

4. Also within ten (10) days after receipt of the Notice of the Assembly of the Record, the appealing party must either work out an agreement with the Commission as to the contents of the record appendix or serve upon the Commission a designation of the parts of the record which the appealing party intends to include in the appendix and a statement of the issues which the appealing party intends to present for review. (See M.R.A.P. 18) (Please note: if portions of the record include testimony preserved by tape recording, the appealing party will need to have the recordings transcribed if they are necessary for inclusion in its record appendix).

5. The appealing party then has forty (40) days after the case is docketed in the Appeals Courts in which to file a brief. (15 copies of each brief and appendix are filed with the Clerk of the Appeals Court, 2 copies of

brief and appendix are served on the Commission and any Intervenor.) (See M.R.A.P. 18 & 19)

6. The Commission, as appellee, then has 30 days to file its brief after service of the appellant's brief. (See M.R.A.P. 19)

7. The appealing party may file a reply brief within fourteen (14) days after service of the Commission's brief. (See M.R.A.P. 19)

8. The case is then ready to be scheduled by the Court for oral argument. (See M.R.A.P. 22)