STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
JODY ZEPP	*	
Charging Party	*	
v.	*	PSLRB Case No. SV 2015-05
HOWARD COUNTY EDUCATION ASSOCIATION	*	
Charged Party	*	

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DECISION AND ORDER DISMISSING CHARGE

I. INTRODUCTION

On January 8, 2015, Ms. Jody Zepp filed a Charge of Violation of Title 6, Subtitle 4 or Subtitle 5, of the Education Article ("Form PSLRB-05"), with the Public School Labor Relations Board ("PSLRB"). Form PSLRB-05 reflects the authority granted to the PSLRB by § 2-205(e)(4)(i) of the Education Article to "decide any controversy or dispute arising under Title 6, Subtitle 4 or Subtitle 5 of this Article."

In her Charge, Zepp claims that the Howard County Education Association ("Association") violated §§ 6-402 and 6-409 of the Education Article by interfering with her right to participate in the election for Association President as a candidate.[1] On

[1] Section 6-402 provides:

January 28, 2015, the Association filed a motion to dismiss the Charge. On February 9, 2015, Zepp filed a response.

II. STATEMENT OF FACTS

This case involves the Association's election for the office of president. The two candidates for that office were Mr. Paul Lemle, the incumbent, and Zepp. The nomination period for the election ended on December 17, 2014; voting in the election began on January 26, 2015 and ended on February 20, 2015. Election results were announced on February 24, 2015, and Lemle won re-election.

To prepare for her campaign, Zepp made requests for the Howard County Public School System e-mail addresses of all Association members, information related to the election process, the internal operations of the Association, and its recent collective bargaining activities. Zepp presented these requests to John Eckstrom, "HCEA Elections Chair," on December 28, 2014, and January 2, 2014.

> (a) Public school employees may form, join, and participate in the activities of employee organizations of their own choice for the purpose of being represented on all matters that relate to salaries, wages, hours, and other working conditions.
>
> (b) An employee organization may establish reasonable:
>
> (1) Restrictions as to who may join; and
> (2) Provisions for the dismissal of individuals from membership.

Section 6-409 provides:

> A public school employer and employee organization may not interfere with, intimidate, restrain, coerce, or discriminate against any public school employee because of the exercise of his rights under §§ 6-402 and 6-403 of this subtitle.

On January 5, 2015, Eckstrom sent an e-mail to all candidates for Association office regarding the Election Forum to take place at the "Rep Council Meeting" on January 13, 2015. The format of the Election Forum included the following:

> All candidates will have an opportunity to address Rep Council with a speech lasting no longer than two minutes. Please, in your dialogue, address what you wish BUT WITH POSITIVE COMMENTS and no part of your speech should address other candidates.

(Capitals in original).

On January 6, Zepp sent Eckstrom an e-mail reiterating her request for the School System "email addresses" of all bargaining unit members and insisting that a provision of the Association's Election Guidelines prohibiting use of the School System's e-mail system unlawfully interfered with her ability to participate in union activity. Eckstrom responded the same day by advising Zepp that her request for the e-mail addresses would be denied. The provision of the Election Guidelines in question states, "No HCEA member or candidate for office may use the HCPSS email system to support any candidate and or election process."

On January 7, Eckstrom sent another e-mail to Zepp arranging for her access to several items of information she had requested; he explained that he was not able to provide the minutes of bargaining sessions for recent contract negotiations, as these were maintained by the negotiations team and not shared with the Board of Directors. Relying on the Election Guidelines, Eckstrom refused again to provide the e-mail addresses of all bargaining unit members.

III. POSITIONS OF THE PARTIES

Zepp claims that the Association has interfered with her right to "participate effectively" in Association activities by prohibiting her from: "(1) sending emails to the approximate 5,000 members of the bargaining unit by using the Howard County Public School System's email system; and (2) mentioning the name of the other candidate for HCEA president, who is the incumbent, and making only 'positive' comments at an HCEA event scheduled for January 13, 2015." Zepp contends that these restrictions favored Lemle and disadvantaged her: with respect to the restriction on the use of the School System's e-mail system, Zepp contends that Lemle used the e-mail system to promote his candidacy; with respect to the "positive comments only" format of the January 13 Elections Forum, Zepp contends that the format was intended to insulate Lemle from "the adverse implications of a decision by the Howard County Board of Education Ethics Panel that he engaged in unethical conduct" (unrelated to the election). Zepp further alleges that the Association unlawfully refused to provide information that she needed for her campaign.

The Association moves to dismiss on several grounds: that Zepp's Charge is purely an internal union matter, divesting the PSLRB of jurisdiction, and that she has thereby failed to state a claim for which relief can be granted; that Zepp has failed to utilize the Association's internal procedure for challenging elections; and that, as a factual matter, the Association has not interfered with any right of Zepp's to participate in Association activity.

IV. ANALYSIS

In deciding this matter, we assume the truth of the factual allegations of the Charge and the reasonable inferences that may be drawn from those allegations in the light most favorable to Zepp.

A. Jurisdiction

Section 6-402 provides:

> (a) Public school employees may form, join, and participate in the activities of employee organizations of their own choice for the purpose of being represented on all matters that relate to salaries, wages, hours, and other working conditions.
>
> (b) An employee organization may establish reasonable:
>
> (1) Restrictions as to who may join; and
> (2) Provisions for the dismissal of individuals from membership.

According to the Association, Zepp has not been prohibited from participating in Association activities that relate to activities protected under § 6-402(a), namely activities that "relate to salaries, wages, hours, and other working conditions." Rather, according to the Association, Zepp's claims are "focused purely on internal union matters" which are "not cognizable under Title 6, Subtitles 4 or 5 of the Education Article." We disagree.

1. Statutory analysis

Initially, language in § 6-402 weighs against the conclusion that the PSLRB lacks jurisdiction over internal union matters generally. Section 6-402(b) imposes a "reasonable restriction" limit on an employee organization's governance of membership. And § 6-409 prohibits an employee organization from taking adverse action against an employee "because of the exercise of his rights under §§ 6-402 and 6-403 of this

subtitle." It follows from § 6-402(b) and § 6-409 that the PSRLB has jurisdiction to determine what constitutes a reasonable restriction on membership, an otherwise internal union matter. For this reason, we see no evidence that the General Assembly intended to deprive the PSLRB of jurisdiction over internal union matters generally.

We turn next to the language of § 6-402(a), which gives to public school employees the right to "participate in the activities of employee organizations of their own choice for the purpose of being represented on all matters that relate to salaries, wages, hours, and other working conditions." Zepp's Charge involves an election to decide who, as president of the Association, will lead it in representing employees on all such matters. The election is clearly an activity of the Association. And participating in the election for the purpose of deciding who will lead the employee organization in representing employees on all matters that relate to salaries, wages, hours, and other working conditions is part and parcel of the "purpose of being represented" on all such matters. On this reading of the plain language of § 6-402(a), the PSLRB has jurisdiction over Zepp's Charge.

The language of § 6-409 is also relevant. Section 6-409 applies without distinction to public school employers and employee organizations. If § 6-402(a) gives employees the right to participate in elections to determine the leadership of the exclusive representative, then § 6-409 protects that right against interference by both the employer and the employee organization. As the below sampling of cases confirms, employers also interfere with elections to determine the leadership of the exclusive representative. Moreover, there is no denying that such elections can occasion significant conflict in a

collective bargaining relationship. Refusing to exercise any authority in this area is not consistent with the purpose of creating stability in the collective bargaining relationship between public school employers and employee organizations, and exercising authority in this area only as against the employer is not consistent with § 6-409.

2. Decisions of other labor boards and courts

Similar to § 6-402(a), Section 7 of the National Labor Relations Act (NLRA) provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,...." 29 U.S.C. § 157. And, similar to § 6-409, Section 8 of the NLRA makes it "an unfair labor practice for a labor organization or its agents – (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in [section 7]...." 29 U.S.C. § 158(b)(1)(A).

Participation in internal union elections is recognized as a protected activity under Section 7 of the NLRA. *See, e.g., Teamsters Local No. 886, Affiliated with Int'l Bhd. of Teamsters (United Parcel Serv.) & Michael D. Reynolds*, 354 NLRB 370 at *3 (2009) (union violated Section 8(b)(1)(A) by making "statement linking Reynolds' protected activity [running against incumbent in union election] with the Respondent's refusal to process his grievances"); *Delphi/delco E. Local 651*, 331 NLRB 479, 484 (2000) ("It is settled law that the activities of employees to oust incumbent union leadership and elect new union officials in an internal union election are concerted activities protected by Section 7 of the Act. Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a

union to restrain or coerce an employee in the exercise of his or her Section 7 rights."); *General Motors*, 211 NLRB 986, 988 (1974) ("We have long held that the right to oppose the reelection of incumbent union officials is protected activity within the meaning of Section 7 of the Act....Thus, the right of employees to distribute literature pertaining to the selection of union officers is intimately interwoven with the right to distribute literature pertaining to the selection or retention of a bargaining representative, and may not be waived by the bargaining agent."); *N.L.R.B. v. Aeronautical Indus. Dist. Lodge No. 91*, 934 F.2d 1288, 1298 (2d Cir. 1991) (union violated Section 8(b)(1)(A) by blocking nomination as candidate for "Labor Representative" in retaliation for criticizing incumbent administration of union because "even if the unions' retaliation against Gilbert involves internal union affairs, it is nonetheless clear that the Act unambiguously regulates the conduct at issue in this case"); *N.L.R.B. v. Methodist Hosp. of Gary, Inc.*, 733 F.2d 43, 46-47 (7th Cir. 1984) (affirming finding that employer violated Section 8(a)(1) [prohibiting employer interference with Section 7 rights] by refusing to permit union election on its property, explaining, "we have no doubt that the employees' election of bargaining committee members to negotiate on their behalf is an exercise of Section 7 rights, protected from employer interference").

Others states have interpreted versions of § 6-402(a) to the same effect. In Ohio, the comparable provision states in relevant part:

> (A) Public employees have the right to: (1) Form, join, assist, or participate in, or refrain from forming, joining, assisting, or participating in, except as otherwise provided in Chapter 4117. of the Revised Code, any employee organization of their own choosing;....

Ohio Rev. Code Ann. § 4117.03. In *State Employment Relations Board v. Amalgamated Transit Union, Local 268*, Case No. 2008-ULP-11-0495 (SERB Op. 2010-013), the Ohio State Employment Relations Board interpreted § 4117.03(A)(1) as follows: "Section 4117.03(A)(1) guarantees public employees the right to participate in an employee organization of their choosing. **Participation in an employee organization includes the right to seek office within the organization.**" *Id.* at 6 (emphasis added).[2] *See also DeVoss v. Amalgamated Transit Union, Local 587*, Decision 8633 – PECB, 2004 WL 5244615 (2004), *aff'd* 2005 WL 1046287 (Washington Public Employment Relations Commission, 2005) (Commission had jurisdiction because right of employees to organize and designate representatives of their own choosing for the purpose of collective bargaining "is broad enough to also protect the right of employees to be free from interference when choosing the individuals who will carry out the tasks of representing

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[2] Pursuant to Ohio Rev. Code Ann. § 4117.19 (c)(4), an employee organization seeking certification as an exclusive representative is required to submit a copy of its constitution or bylaws, which, *inter alia*, "[r]equire periodic elections of officers by secret ballot subject to recognized safeguards concerning the equal right of all members to nominate, seek office, and vote in the elections,...." The Ohio Board observed that § 4117.19 (c)(4) simply "confirms the right to seek office" established in § 4117.03(A)(1). *Id.* at 6-7.

We note that a similar provision is contained in the collective bargaining laws administered by the Maryland State Labor Relations Board and the Maryland State Higher Education Labor Relations Board. State Pers. & Pens. Article ("SPP") § 3-404(1)(ii) ("Each employee organization that seeks certification as an exclusive representative shall file with the Board: (1) a copy of the employee organization's governing documents, which:...(ii) require periodic elections by secret ballot that are conducted with recognized safeguards to ensure the equal rights of all members to nominate, seek office, and vote in the elections;...."). SPP § 3-404(1)(ii) can be read as confirming the right to seek office established in SPP § 3-301(a)(1), which grants employees the right to participate "in any employee organization or its lawful activities,...." Reading SPP § 3-404(1)(ii) in this way, the absence of a similar provision in the laws administered by the PSLRB does not evidence an intention that public school employees are to have no protection of the right to participate in internal union elections. Our review of the legislative history of the laws administered by the PSRLB has not produced any evidence that the General Assembly intended by the omission of a provision like SPP § 3-404(1)(ii) to deny such protection to public school employees.

the union."); *Madison Public Schools and Lenawee County Education Association, MEA/NEA*, 19 MPER ¶ 38 (Michigan Employment Relations Commission, 2006) (by actively soliciting bargaining unit members to run for union president, superintendent unlawfully interfered with employees' statutory right to "[o]rganize together or form, join, or assist in labor organizations;....").

In sum, the PSLRB concludes that it has jurisdiction over Zepp' Charge to the extent that she alleges that the Association, as exclusive representative, has violated Education Article §§ 6-402 and 6-409 by interfering with her right to participate in the Association's election for president.

B. Exhaustion of Internal Remedies

According to the Association, even if the PSLRB has jurisdiction over Zepp's Charge, her claims are not ripe for review because Zepp has not utilized the following internal procedure:

> 16. Any dispute concerning election procedure or appeal of election results will be referred to the Elections Committee. Appeals must be filed within ten (10) calendar days after the official results are announced. If a member is not satisfied with the results of the Elections Committee's decision, an appeal must be filed with the Review Board within ten (10) calendar days.

This procedure contains two steps for challenging election results: (1) appeal to the Elections Committee within ten calendar days after announcement of official results; and (2) appeal to the Review Board within ten calendar days after the Elections Committee's decision.

The PSLRB will not consider the merits of an alleged violation of an employee's right to participate in an internal union election unless internal union remedies have been exhausted.[3] *State Employment Relations Board v. Amalgamated Transit Union, Local 268*, Case No. 2008-ULP-11-0495 (SERB Op. 2010-013) at 6 ("Before SERB considers the merits of an alleged § 4117.11(B)(1) violation, internal union remedies must be exhausted."). The question, then, is whether Zepp has exhausted the Association's internal remedies as set forth in the above procedure.

The exhaustion requirement is critical "to foster a situation in which the unions themselves could remedy as many election violations as possible without the Government's ever becoming involved," a situation which serves to "preserve and strengthen unions as self-regulating institutions,...." *Hodgson v. Local Union 6799, United Steelworkers of Am., AFL-CIO*, 403 U.S. 333, 339 (1971) (failure of union member's election complaint to include an objection to meeting-attendance rule during his pursuit of internal union remedies when the member was aware of the existence of the rule barred later challenge under the Labor-Management Reporting and Disclosure Act).[4] In recognition of the value of union self-regulation, before becoming involved in an

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[3] The exhaustion requirement does not toll PSLRB's 60-day statute of limitations. COMAR 14.34.04.03.A(2). A timely filed charge of statutory violation against an employee organization involving an internal union election may be held in abeyance pending exhaustion.

[4] The Labor-Management Reporting and Disclosure Act (LMRDA) establishes, *inter alia*, certain procedures for internal union elections. 29 U.S.C.A. §§ 481-483. According to the Association, it "represents only public sector employees or those employed by the Board of Education of Howard County." Based upon this representation, the LMRDA does not apply to the Association, as Zepp appears to agree. 29 U.S.C.A. § 402(e); 29 C.F.R. § 452.12; 29 C.F.R. § 451.3. While the PSLRB is not bound by provisions of the LMRDA or decisions interpreting same, these sources may provide guidance to the PSLRB in adjudicating charges of statutory violation involving internal union elections.

internal union election, the PSLRB will require that an employee make a reasonable effort to comply with the internal procedure established by an employee organization to address election challenges.

Election results were announced on February 24, 2015. Pursuant to the Association's internal procedure, Zepp was required to appeal the election results by March 6, 2015. In her response to the Association's motion to dismiss, filed before election results were announced, Zepp argued that she was not required to exhaust the Association's internal procedure because it would be futile to do so. According to Zepp, the Association manifested "overt hostility" toward Zepp in its allegations made in both the Charge and lawsuit that it filed against the County Board.[5] Zepp also maintains that the Review Board referred to in the Association's internal procedure does not exist.

From Zepp's argument that she was not required to exhaust the Association's internal procedure, coupled with her failure to inform the PSLRB subsequent to announcement of the election results that she changed her position and has in fact appealed the results, we draw the reasonable inference that Zepp has not appealed the election results. We do not find Zepp's failure to appeal the election results as constituting a reasonable effort to comply with the Association's internal procedure for challenging elections.

Zepp's assertion of hostility is insufficient. Some degree of hostility, and often a great deal of hostility, is bound to develop between incumbent and challenger factions in

[5] *Howard County Education Association v. Howard County Board of Education*, PSLRB Case No. SV 2015-04 (withdrawn). The lawsuit refers to a suit for injunctive relief brought by the Association in relation to its Charge against the County Board.

an internal union election. There might be some cases where the hostility generated has infected all of the steps in a union's internal procedures to such a degree as to preclude a fair hearing on an election challenge. *See Hammer v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, 178 F.3d 856, 858 (7th Cir. 1999) (with respect to the exhaustion requirement applied to claims filed under the Labor Management Relations Act, 29 U.S.C. § 185, "[i]t is well-settled…that a plaintiff must show that union hostility is so pervasive that it infects every step of the internal appeals process."). But that possibility does not justify an employee in taking no action to comply with any of those steps, here those steps being an appeal to the Elections Committee within ten calendar days of the announcement of election results and then, if necessary, an appeal to the Review Board within ten calendar days of the decision of the Elections Committee.

Zepp also claims that the Review Board referred to in the Association's internal procedure does not exist. While we assume the truth of Zepp's claim that the Review Board does not presently exist, that does not compel a ruling in Zepp's favor on the issue of exhaustion. It may be that the Review Board is not presently constituted but would be constituted, at least on an *ad hoc* basis, following a decision by the Elections Committee denying Zepp's challenge to the election results. Absent an effort to utilize the Association's internal procedure to challenge the election results, Zepp can only assume that there would be no Review Board to hear her appeal from the Elections Committee's decision. We do not share in that assumption. Zepp was required to make a reasonable

effort to comply with the Association's internal procedure for challenging election results, and she did not do so. For that reason, Zepp's Charge must be dismissed.

V. CONCLUSIONS OF LAW

For the above reasons, the PSLRB concludes that it has jurisdiction over Zepp's Charge to the extent that she alleges that the Association, as exclusive representative, has violated Education Article §§ 6-402 and 6-409 by interfering with her right to participate in the Association's election for president. The PSLRB concludes further that Zepp has failed to exhaust internal union remedies and for this reason dismisses Zepp's Charge. Our decision does not include any finding or conclusion regarding the merits of Zepp's Charge.

ORDER

(1) The Association's Motion to Dismiss on grounds that the PSLRB lacks jurisdiction over Zepp's Charge is hereby DENIED;

(2) The Association's Motion to Dismiss on grounds that Zepp has failed to exhaust internal union remedies is hereby GRANTED;

(3) The Association's Motion to Dismiss on all other grounds is moot and is hereby DENIED;

(4) Zepp's Charge in the instant case is hereby DISMISSED.

BY ORDER OF THE PUBLIC SCHOOL LABOR RELATIONS BOARD

Seymour Strongin, Chairman

Ronald S. Boozer, Member

Robert H. Chanin, Member

Charles I. Ecker, Member

Donald W. Harmon, Member

Annapolis, MD

April 3, 2015

APPEAL RIGHTS

Any party aggrieved by this action of the PSLRB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act – Contested Cases), and Maryland Rules 7-201 *et seq*. (Judicial Review of Administrative Agency Decisions).