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"Legal Opinions; Series I; File 95." Juanita Hunter, RN & NYSNA Papers [1973-1990]. Monroe Fordham Regional History Center, Archives & Special Collections Department, E. H. Butler Library, SUNY Buffalo State.

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#95 LEGAL OPINIONS

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AGENDA #16(a)

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January 16, 1989

Martha L. Orr, M.N., R.N.
Executive Director
New York State Nurses Association
The Center for Nursing
2113 Western Avenue
Guilderland, New York, 12084

Dear Ms. Orr:

This responds to Wendy Burbank's December 16, 1988, letter about "the legality of continuing to require the registration fee for participation in Voting Body sessions so that the Board may consider this issue in conjunction with establishment of fees".

Since your Association is a "labor organization" within the meaning of the United States Labor-Management Reporting and Disclosure Act of 1959 (i.e., Landrum-Griffin Act [herein "LMRDA"]), and a not-for-profit corporation, incorporated under New York Not-for-Profit Corporation Law [herein "NPCL"], the status of the registration fee will be considered under each statute.

LMRDA

LMRDA Title I establishes a "Bill of Rights for Members of Labor Organizations", which, in section 101, provides"

Equal Rights

- (1) Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Freedom of speech and assembly

- (2) Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Dues, Initiation Fees and Assessments

- (3) Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except
 - (A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or
 - (B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

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Protection of the Right to Sue

- (4) No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

Safeguards Against Improper Disciplinary Action

- (5) No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Further, section 102 provides that:

Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

As far as labor organization elections are concerned, section 401 says:

- (a) Every national or international labor organization except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

- (b) Every local labor organization shall elect its officers not less than once every three years by secret ballot among the members in good standing.

Since the registration fee only applies to your Association's annual membership meeting and the business transacted therein, the questions to be considered involve changes in Association membership dues and other Association business that is transacted at the annual meeting. I will not consider election of Association officers since that is accomplished by a mail ballot among all Association members, pursuant to LMRDA section 401.

Dues

In the case of a "local labor organization", which applies to the Association, the procedures for increases in dues are statutorily mandated in section 101(b)(1): by majority vote by secret ballot of the "members in good standing" voting at a general or special membership meeting", or by majority vote in a secret mail ballot among all "members in good standing", which section 3(a) defines thus:

"Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

Thus, a "member in good standing" has an absolute right to vote for a labor organization dues increase that is submitted for approval at the organization's general or special membership meeting; and any requirement that conditions that right to vote on payment of a registration fee for the meeting would not survive a legal challenge under LMRDA section 102.

If a court finds that such a legal challenge is valid, the remedy would be to void the dues increase vote, i.e., roll back the dues to the previous level, retroactive to when the increase occurred.

Accordingly, whenever your Association conducts an on-site secret ballot vote for a dues increase, any member must have the right to vote, regardless of whether the member is registered at the convention.

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LEGAL OPINIONS

Voting Body Sessions

As noted above, LMRDA section 101(a)(1) guarantees that every labor organization member shall have the right to "attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings". However, these rights, unlike the right to vote on a dues increase, are subject to reasonable rules and regulations in such organization's constitution and bylaws".

These rights reflect a legislative determination that labor organization members should be assured of the right to speak and fully participate in the operation of their labor organization. In Steelworkers v. Sadlowski, 457 U.S. 102 (1982), the United States Supreme Court described the purpose of section 101(a)(2), which protects a member's right of free speech and assembly, which also relates to the purpose of section 101(a)(1):

This history reveals that Congress modelled Title I after the Bill of Rights, and that the legislators intended §101(a)(2) to restate a principal First Amendment value - the right to speak one's mind without fear of reprisal. However, there is absolutely no indication that Congress intended the scope of §101(a)(2) to be identical to the scope of the First Amendment. Rather, Congress' decision to include a proviso covering "reasonable" rules refutes that proposition. First Amendment freedoms may not be infringed absent a compelling governmental interest. Even then, any government regulation must be carefully tailored, so that rights are not needlessly impaired. Brown v. Hartlage, ___ U.S. ___, ___ (1982). Union rules, by contrast, are valid under §101(a)(2) so long as they are reasonable; they need not pass the stringent tests applied in the First Amendment context.

To determine whether a union rule is valid under the statute, we first consider whether the rule interferes with an interest protected by the first section of §101(a)(2). If it does, we then determine whether the rule is "reasonable" and thus sheltered by the proviso to §101(a)(2). In conducting these inquiries, we find guidance in the policies that underly the LMRDA in general and Title I in particular. First Amendment principles may be helpful, although they are not controlling. We must look to the objectives Congress sought to achieve, and avoid "placing great emphasis upon close construction of the words." Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 468 & n. 6, 67 LRRM 2129 (1968) (quoting Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960); Hall v. Cole, 412 U.S. 1, 11 & n. 17, 83 LRRM 2177 (1973)). The critical question is whether a rule that partially interferes with a protected interest is nevertheless reasonably related to the protection of the organization as an institution.

Thus, if a member challenges the registration fee on the basis that it limits the member's access to voting body sessions, the reviewing court would use a two-part test. The first part is whether the registration fee requirement infringes on a right protected by section 101(a)(1). If so, only then is the second part of the inquiry reached: is the rule reasonable? In determining reasonableness, the court will "balance the undemocratic effects of the rule against the interests of protecting the union organization as an institution" (Steelworkers v. Sadlowski).

Since there is no reported case involving the validity of an annual meeting registration fee, I would assume that the challenging member would argue that being obligated to pay a fee to exercise his or her voting body membership rights is, in effect, a restriction on those rights; the fee somehow discourages members from attending the annual meeting. Your Association would respond by asserting that (1) as a professional association, the annual convention covers a multitude of professional activities and the fee is needed to defray the cost of those activities plus the materials that are distributed, (2) the fee has historically been charged without objection, (3) such fees are common among almost all professional associations, (4) it does not discourage anyone from attending the convention and (5) being a professional association, the members need the voluminous materials for intelligent participation. If the reviewing court finds the imposition of the fee to be unreasonable, it could nullify whatever action was taken at the meeting.

Alternatives to avoid this problem are (1) permit all members to attend the convention without paying the registration fee, but charge a fee for all the materials, (2) establish a dual badge system; those who pay the fee can attend all voting body and other sessions; those who do not can only attend the voting body sessions and (3) permit all members to attend the voting body sessions, without fee and impose separate, individual fees for every other activity that a member seeks to attend.

NPCL

Unlike the LMRDA, the NPCL does not contain any detailed "Bill of Rights" for not-for-profit corporation members, nor does it even address the question of a dues increase. It merely states, in section 603:

- (a) Meetings of members may be held at such place, within or without this state, as may be fixed or under the by-laws or, if not so fixed, at the office of the corporation in this state.
- (b) A meeting of the members shall be held annually for the election of directors and the transaction of other business on a dated fixed or under the by-laws.

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Further, section 602, concerning corporate bylaws, says:

...

- (f) The by-laws may contain any provision relating to the business of the corporation, the conduct of its affairs, its rights or powers or the rights or powers of its members, directors or officers, not inconsistent with this chapter or any other statute of this state or the incorporate certificate.

Your Association's bylaws provide for voting body registration in Article XIII, section 2, and give each member the right to attend and vote at meetings "in accordance with established policy" in Article XIV, section 2. A member challenging the registration fee under the NPCL would have to show that the bylaws' provisions were unlawful, because they somehow deprive or restrict a member's voting rights. Since there is no reported case under the NPCL regarding the validity of a registration fee, the reviewing court would, in all probability, follow a "reasonableness" test, but give your Association far more latitude than under the LMRDA, because of the absence of any "Bill of Rights" provision in the NPCL. The NPCL, as a matter of its fundamental purpose, gives wide latitude to a not-for-profit corporation in establishing its own bylaws, policies and procedures.

If you have a question about any of this, please call me.

Sincerely,



Richard J. Silber

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January 16, 1989

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