

STATE OF MARYLAND
PUBLIC SCHOOL LABOR RELATIONS BOARD

IN THE MATTER OF: *

MARK J. RESNICK *

Charging Party *

v. *

PSLRB Case No. SV 2014-13

ASSOCIATION OF SUPERVISORY
AND ADMINISTRATIVE SCHOOL
PERSONNEL *

Charged Party *

* * * * *

DECISION AND ORDER GRANTING REQUEST FOR RELIEF, IN PART, AND
DENYING REQUEST FOR RELIEF, IN PART

I. INTRODUCTION

On February 25, 2014, Mark J. Resnick (“Charging Party”), a non-certificated employee of the Prince George’s County Board of Education (“County Board”), 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 his Charge, Charging Party claims that his union, the Association of Supervisory and Administrative School Personnel (“ASASP”), violated § 6-503(a) of the

Education Article by imposing on him certain requirements in order to be reinstated as a member of ASASP.

II. FINDINGS OF FACT

On January 6, 2014, the PSLRB issued its Decision and Order Denying Request for Relief and Dismissing Charge, in the matter of *Mark J. Resnick v. Association of Supervisory and Administrative School Personnel*, PSLRB Case No. SV 2014-06 (“*Resnick I*”). For purposes of relating the instant Charge to *Resnick I*, it suffices to recall that in a series of communications between Charging Party and ASASP leadership, from April 2013 to October 2013, the parties disputed the status of Charging Party’s membership in ASASP.

The culminating exchanges in October 2013 included a letter dated October 8, 2013, from ASASP President Dwayne Jones advising Charging Party:

In other words, an employee who previously withdrew from the union, is required to submit his or her request to a change in the membership status directly to ASASP for submission to Human Resources department, and not to the Payroll and Benefits or any other department.

On October 15, 2013, Charging Party received an e-mail from Jones, stating, “You are not a member of this union. If you need representation on a disciplinary action, we will assist you[.] [W]e are under no obligation to offer you anything further.”

In its November 13, 2013 response to the Charge in *Resnick I*, ASASP made the following representation to the PSLRB:

On October 8, 2013, one week before Mr. Resnick filed his charge, Mr. Jones reiterated that, to rejoin the Association and once more enjoy the full privileges and benefits of union membership, all Mr. Resnick had to do was

provide a signed letter to the union. Rather than take this simple, expedient step, Mr. Resnick instead filed the Charge.

...

Resnick simply has not alleged any facts that the Association has violated his rights under §§ 6-503(a) and 6-504(a) of the Education Article. The only requirement that the Association has made of Mr. Resnick is that he provide a signed statement requesting reinstatement. Such a requirement is well within the Association's rights under § 6-503(b) of the Education Article. Once such a request is received, Mr. Resnick will be restored to all of the rights and benefits of union membership, including the sick leave bank. To date, however, Mr. Resnick has declined to provide such written request and he remains a non-member of the Association.

(ASASP Response, Resnick I, filed November 13, 2013 at p. 6). By letter dated November 14, 2013, Charging Party informed ASASP, "In accordance with section 2.05 of the collective bargaining agreement, I respectfully request my membership in ASASP be reinstated."

In deciding *Resnick I*, we concluded that ASASP had not wrongfully revoked Charging Party's membership in ASASP or wrongfully refused to reinstate his membership. We added in the Decision in *Resnick I* the following:

We recognize that communications from ASASP and its attorney may have sent mixed signals to Charging Party with regard to the reinstatement of his membership. Should ASASP refuse to reinstate Charging Party's membership consistent with its representation in the October 8, 2013 letter, Charging Party may elect to file a new Charge with the PSLRB based on this refusal.¹

Following issuance of the Decision in *Resnick I*, by letter dated January 8, 2014, Charging Party informed ASASP,

In accordance with section 2.05 of the collective bargaining agreement, and consistent with ASASP's representation in its October 8, 2013 letter to me,

¹ *Resnick I*, Decision and Order at p. 10 n.4.

and in light of the fact that the case between myself and ASASP with the PSLRB has now been resolved, I respectfully request my membership in ASASP now be reinstated and the appropriate dues be deducted from my paycheck.

By e-mail dated January 23, 2014, Jones and ASASP Vice President Alyce Hood advised Charging Party, "ASASP is in receipt of your requests for reinstatement into active status membership. Your requests will be presented to the Board of Directors for a vote during its next meeting." Charging Party responded by e-mail the same day, "Thank you for acknowledging my letter and e-mail. However, I believe membership in ASASP is a right of Unit II and Unit III employees and not subject to a 'vote,' according to Article III of the By-laws."

On February 26, 2014, ASASP Board of Directors adopted a "Code of Conduct" governing the conduct of members and establishing procedures for removing active members and admitting potential members.

By letter dated March 5, 2014, Jones advised Charging Party as follows:

You are invited to attend the next ASASP Board of Director's meeting on March 10th wherein you will be afforded ten minutes to address the Board pertaining to your several requests for reinstatement back into ASASP. Please notify the ASASP by close of business Friday of your intentions to attend the March 10th Board meeting so that we may schedule the matter for 5:00 p.m. on the agenda.

By letter dated March 6, 2014, Charging Party informed Jones that he was declining the invitation to address the Board of Directors regarding his request for reinstatement. Charging Party insisted that "Article III of the Association's own By-laws" did not impose any such condition on membership by which an employee seeking membership must petition the Board of Directors. Charging Party added, "To ask me to do something

that no other member of the ASASP has to do, in order to gain membership to the Association, is inequitable and shows bias against me.”

III. POSITIONS OF THE PARTIES

Charging Party argues that he is entitled to be reinstated to membership in ASASP in accordance with Article III of the ASASP Bylaws, which provides in relevant part:

SECTION 1. Membership in this Association shall be open to all administrators, supervisors, and other professionals employed by the Prince George's County Public Schools who are designated by the Board of Education as members of Unit II and Unit III with the exception of such employees as are excluded by the laws of the State of Maryland for collective bargaining.

Charging Party relies additionally on ASASP’s letter of October 8, 2013 advising him on how to request a change in membership status. In conjunction with the October 8 letter, Charging Party relies on this Board’s decision in *Resnick I*, in which we indicated that Charging Party may elect to file a new Charge should ASASP refuse to reinstate his membership consistent with its representations in the October 8 letter.

Charging Party maintains that the additional conditions on reinstatement – that he address the Board of Directors regarding his request for reinstatement and that his request for reinstatement be subject to a vote by the Board of Directors – are not published, have not previously been imposed on other potential members, and have been imposed on him in a “discriminatory manner” in violation of his statutory rights. As a remedy, Charging Party requests the PSLRB to order his reinstatement to ASASP membership, retroactive to July 1, 2013, “with all the rights and privileges of that membership, including my participation in the sick leave bank.” Charging Party also requests the PSLRB to issue an

order to the effect that “[w]hen an ASASP member wants to resign their [sic] membership, ASASP should require a signed letter or form from that member, which clearly states that member’s intention to resign from this union.”

ASASP maintains that its treatment of Charging Party accords with the Code of Conduct. During negotiations in 2013, ASASP recognized a “lack of standards for its Board of Directors and general membership.” The Code of Conduct was subsequently adopted as a set of procedures “to remove disruptive and disloyal members and to evaluate whether to extend membership to non-members that may have a history of disruptive activities or conduct that is construed to be counter to the union’s mission statement or purpose.”

ASASP contends that “in accordance with the Code of Conduct, the ASASP Board of Directors invited Mr. Resnick to meet with the Board for the sole purpose to consider his request for reinstatement back into the union.” Because Charging Party “rejected that opportunity and, instead, chose to file the present complaint” and “declined to pursue reinstatement to membership pursuant to ASASP’s internal procedures,” ASASP considers “the membership issue to be closed.”

IV. ANALYSIS

We decide this case on the basis of the doctrine of judicial estoppel. “Judicial estoppel is defined as ‘a principle that precludes a party from taking a position in a subsequent action inconsistent with a position taken by him or her in a previous action.’” *Dashiell v. Meeks*, 396 Md. 149, 170-171 (2006) (emphasis added) (citations omitted). Three circumstances must exist for the doctrine of judicial estoppel to apply:

(1) one of the parties takes a factual position that is inconsistent with a position it took in previous litigation, (2) the previous inconsistent position was accepted by a court, and (3) the party who is maintaining the inconsistent positions must have intentionally misled the court in order to gain an unfair advantage....Thus, judicial estoppel applies when it becomes necessary to protect the integrity of the judicial system from one party who is attempting to gain an unfair advantage over another party by manipulating the court system.

Id. at 171 (citations omitted).

The doctrine of judicial estoppel applies to prevent a party from acting against a promise previously made as well as from taking factually inconsistent positions. *See, e.g., Lippitt v. Raymond James Fin. Servs.*, 340 F.3d 1033, 1046 (9th Cir. 2003) (“We remand in reliance that Lippitt will adhere to this promise, as well as to the characterization of the complaint which he offered to us, since judicial estoppel ‘bars a party from taking inconsistent positions in the same litigation.’”) (citation omitted); *Chance v. Board of Examiners*, 561 F.2d 1079, 1092 (2d Cir. 1977) (“we emphasize that the Examiners have agreed not to revert to the original examination system, [and] that they are judicially estopped from doing so”).

The doctrine of judicial estoppel applies in administrative proceedings. *See Chaney Enters. Ltd. P'ship v. Windsor*, 158 Md. App. 1, 38-42 (2004) (affirming application of doctrine of judicial estoppel by Workers’ Compensation Commission in relation to statement made in prior Commission proceeding and citing numerous jurisdictions recognizing that the doctrine of judicial estoppel applies to administrative proceedings). Also, the doctrine of judicial estoppel may be raised by a court *sua sponte*. *See Eagan v. Calhoun*, 347 Md. 72, 88 (1997) (applying *sua sponte* the doctrine of

estoppel by admission); and *Brown v. Mayor & City Council*, 167 Md. App. 306, 325 (2006) (“Judicial estoppel is a doctrine designed to protect the integrity of the courts; for that reason, it can be raised *nostra sponte*.”).

In its November 13, 2013 response to the Charge in *Resnick I*, ASASP unequivocally represented to the PSLRB that the only step that Charging Party had to take in order to be reinstated to membership in ASASP was to provide a signed statement requesting reinstatement:

On October 8, 2013, one week before Mr. Resnick filed his charge, Mr. Jones reiterated that, to rejoin the Association and once more enjoy the full privileges and benefits of union membership, **all Mr. Resnick had to do was provide a signed letter to the union**. Rather than take this simple, expedient step, Mr. Resnick instead filed the Charge.

...

Resnick simply has not alleged any facts that the Association has violated his rights under §§ 6-503(a) and 6-504(a) of the Education Article. The only requirement that the Association has made of Mr. Resnick is that he provide a signed statement requesting reinstatement. Such a requirement is well within the Association’s rights under § 6-503(b) of the Education Article. **Once such a request is received, Mr. Resnick will be restored to all of the rights and benefits of union membership, including the sick leave bank.** To date, however, Mr. Resnick has declined to provide such written request and he remains a non-member of the Association.

(Emphases added). ASASP’s position in the present case is that Charging Party must now do more than provide a signed statement requesting reinstatement. In accordance with the Code of Conduct, Charging Party must now appear before the Board of Directors and subject his request to a vote. As these are inconsistent positions, the first prerequisite for applying the doctrine of judicial estoppel is met.

In dismissing the Charge in *Resnick I*, we relied in part on ASASP's November 13 response. After referring to the response and quoting from the October 8, 2013 letter attached as an exhibit to the response, we immediately concluded, "In light of the above, and in the absence of evidence that ASASP violated Charging Party's rights under Section 6-503(b), we find no basis for concluding that it wrongfully denied Charging Party's request for reinstatement to membership." We added a footnote to communicate our expectation that Charging Party would, if he so chose, be reinstated to membership consistent with ASASP's representations in the October 8 letter, as reaffirmed in its November 13 response. As ASASP's previous inconsistent position was accepted by the PSLRB, the second prerequisite for applying the doctrine of judicial estoppel is met.

With respect to the third prerequisite, we cannot avoid the conclusion that ASASP intentionally misled the PSLRB. On January 23, 2014, only seventeen days after we issued the Decision in *Resnick I*, ASASP informed Charging Party that his request for reinstatement was to be presented to the Board of Directors for a vote, a condition contained in the Code of Conduct, implementation of which was inspired by events in 2013. It simply strains credulity to believe that ASASP had no intention before January 6, 2014, when there was still time to amend its response to the Charge in *Resnick I*, of imposing additional conditions on Charging Party's request for reinstatement. In the end, ASASP's actions on the heels of the Decision in *Resnick I* demonstrate that it never intended to reinstate him on the simple condition of his providing a signed statement requesting reinstatement. To the unfair disadvantage of Charging Party, he remains a non-member of ASASP.

Because the requisite circumstances for applying the doctrine of judicial estoppel exist in this case, we conclude that ASASP is estopped from imposing any conditions on Charging Party's reinstatement to membership, in addition to the one condition stated in its response in *Resnick I*. Because Charging Party fulfilled that one condition for reinstatement by submitting a signed statement on January 8, 2014 requesting reinstatement, he is entitled to be reinstated to membership in the ASASP, with all the rights and privileges of that membership, retroactive to January 8, 2014.²

Our decision does not impair ASASP's rights under § 6-503(b) of the Education Article, which provides:

(b) Membership restriction and dismissal. -- An employee organization may establish reasonable restrictions as to who may join and reasonable provisions for the dismissal of individuals from membership, except that these restrictions and provisions may not discriminate with regard to the terms or conditions of membership because of race, color, marital status, creed, sex, age, or national origin.

A restriction on membership that jeopardizes the integrity of the PSLRB is not a reasonable restriction for purposes of § 6-503(b). Section 6-503(b) must be read together with §§ 2-205(e)(4)(i) and 6-807(a)(2) of the Education Article, in which the General Assembly vested the PSLRB with the authority to decide controversies and disputes under Title 6, Subtitles 4 and 5. *See Office of People's Counsel v. Maryland PSC*, 355 Md. 1, 22 (1999) (“the legislative intention is not determined from that statute alone, rather it is to be discerned by considering it in light of the statutory scheme”) (citation omitted). To accept the inconsistent positions taken by ASASP would undermine the

² The decision of the PSLRB in the instant matter is without prejudice to any claims that Charging Party may bring in another forum.

integrity of the PSLRB and would be inconsistent with the legislative intent expressed in §§ 2-205(e)(4)(i) and 6-807(a)(2).

Our decision in this case does not preclude ASASP from applying the Code of Conduct in a matter involving Charging Party, other than the matter of his reinstatement to membership based upon his January 8, 2014 request. Moreover, our decision in this case does not entail an assessment under § 6-503(b) of the reasonableness of any of the restrictions or provisions in the Code of Conduct.

Finally, Charging Party requests that we issue an order declaring what steps must be taken when a member seeks to resign from ASASP. This request has no bearing on the disposition of the instant Charge and, accordingly, is denied.

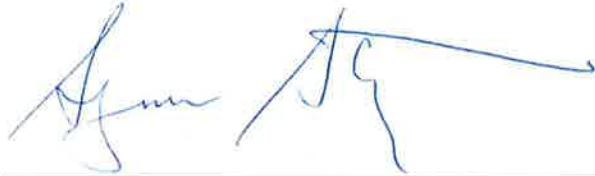
V. CONCLUSIONS OF LAW

For the reasons stated herein, we conclude that ASASP is estopped from imposing any restrictions on Charging Party's reinstatement to membership, except that in order to be reinstated to membership Charging Party must submit to ASASP a signed statement requesting reinstatement. Because Charging Party submitted to ASASP on January 8, 2014 a signed statement requesting reinstatement, he is entitled to be reinstated to membership in ASASP, with all the rights and privileges of membership, retroactive to January 8, 2014. In this respect, Charging Party's request for relief is granted. In all other respects, Charging Party's request for relief is denied.

ORDER

IT IS HEREBY ORDERED THAT THE REQUEST FOR RELIEF IN THE CHARGE FILED IN THE INSTANT MATTER, PSLRB Case No. SV 2014-13, IS GRANTED, IN PART, AND DENIED, IN PART.


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, Ed.D., Member

Annapolis, MD

June 24, 2014

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).