

**DECISIONS OF THE CERTIFICATION OFFICER ON APPLICATIONS MADE
UNDER SECTION 108A OF THE TRADE UNION AND LABOUR
RELATIONS (CONSOLIDATION) ACT 1992**

**IN THE MATTER OF COMPLAINTS MADE AGAINST THE
MANUFACTURING SCIENCE AND FINANCE UNION**

APPLICANT MS S MICHIE

Date of Decisions:

14 March 2001

DECISIONS

- 1.1 Under section 108A(1) of Part I of the Trade Union and Labour Relations (Consolidation) Act 1992 (as amended) (“the 1992 Act”) a person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to me for a declaration to that effect.

- 1.2 Section 108B of the Act empowers me to make such enquiries as I think fit and, after giving the applicant and the union an opportunity to be heard, to make or refuse to make the declaration asked for. Whether or not I make the declaration sought, I am required to give the reasons for my decision in writing.

1.3 Where I make a declaration under section 108B I am required, unless I consider to do so would be inappropriate, to make an enforcement order on the union. My enforcement order is required to impose on the union one or both of the following requirements -

(a) to take such steps to remedy the breach, or withdraw the threat of a breach, as may be specified in the order;

(b) to abstain from such acts as may be specified with a view to securing that a breach or threat of the same or a similar kind does not occur in future.

1.4 On 8 May 2000 I received complaints from Ms Michie, a member of the Manufacturing Science and Finance Union (“MSF”/“the union”). Ms Michie was President of the London Region of MSF. She had been suspended from that office in November 1999 and subsequently, in April 2000, from the offices of National Executive Council member, Regional Council delegate, Branch Chair, workplace representative and Annual Conference delegate. Ms Michie alleged that “...*in suspending her from the office of President of the London Region of MSF and subsequently from all offices within the union, MSF had breached the union’s disciplinary rules.*”

1.5 Ms Michie’s allegations were accepted, by me, as complaints under section 108A(1) of the 1992 Act that the rules of the union had been breached relating to matters mentioned in subsection 108A(2)(b) of the Act, namely disciplinary proceedings by the union. It was agreed by the parties concerned that Ms Michie’s complaints covered five areas as follows: -

- (1) That her suspension from all offices of the union was beyond the powers of the union;
- (2) That there was a breach of rule in that during an investigation she was not informed of any charges made against her;
- (3) That her appeal against her suspension should have been dealt with in accordance with rule and should not have been held in abeyance;
- (4) That the union failed to comply with a Conference Motion in its disciplinary proceedings against her;
- (5) That the union did not have sufficient evidence to warrant the disciplinary action that it took against her.

1.6 I investigated the complaints in correspondence and, on 19 December 2000, held a formal hearing of argument on the complaints. The union was represented by Mr C Ettinger of Irwin Mitchell Solicitors. Mr Ettinger called Mr C Crane, a member of the National Executive Council of MSF as a witness. Ms Michie attended the hearing and was represented by Mr B Todman. Mr Todman had acted as Ms Michie's representative at meetings of the union's disciplinary panel.

Declaration and order

1.7 After careful consideration of the documents, evidence, arguments put to me and the relevant rules of the union: -

“I declare that the Manufacturing, Science and Finance Union was in breach of Rule

14(c) and Rule 17 in that the union failed to allow Ms Michie's appeal against her suspension to be dealt with under rule."

The reasons for my decision are set out below.

1.8 Also for the reasons set out below I refuse to make declarations sought in respect of the other alleged breaches of union rules.

1.9 I believe that, in view of the denial of Ms Michie's right to appeal against her suspension and, in accordance with the requirements of section 108B of the Act, I should issue an enforcement order. So by agreement with the parties (but such agreement being without prejudice to the right of appeal to the Employment Appeal Tribunal), I issue the following order to the Manufacturing, Science and Finance Union;

"That all suspensions in respect of Ms Michie be lifted from the date of this decision until such time as an Appeals Court has considered the question of these suspensions under Rule 17. Such an Appeals Court should be properly constituted under rule to hear Ms Michie's appeal within two months."

For avoidance of any doubt the above order should not be taken to require that the disciplinary proceedings already commenced should be deferred until after the Appeals Court has dealt with Ms Michie's appeal against suspension. For the further avoidance of doubt the material to be regarded as relevant to the Appeals Court hearing shall be confined to material available at the time the appeal was lodged.

Requirements of the Legislation and the relevant union rules

1.10 It may be helpful, at this point, if I set out the relevant statutory requirements of the Act to which I have referred in this decision and the union rules which have a bearing on this application. The relevant statutory requirements are as follows:

“108A.-(1)A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2) may apply to the Certification Officer for a declaration to that effect, subject to subsections (3) to (7).

(2) The matters are -

(a) ...

(b) disciplinary proceedings by the union (including expulsion);

(c) ...

(d) ... ”

1.11 A number of union rules were referred to during the course of the hearing. The following are those relevant to Ms Michie’s application and its determination.

“Rule 3 (Rules)

a)

b)

c)

d) The National Executive Council may by resolution provide for all other matters not otherwise provided for in the Rules.

Rule 14 (Removal from Office)

a)

b)

c) An officeholder facing disciplinary procedures under Rule 16 (Disciplinary Procedures) may be suspended from office pending an appeal. If the appeal is unsuccessful, the NEC shall have the authority to exclude the member from office.

Rule 16 (Disciplinary Procedures)

a) The NEC shall have the power to terminate the membership of, or fine or remove from office any member who, in its opinion, without reasonable excuse:

i) Breaks, evades or violates any provisions contained in the Rules and Objects of the Union;

ii) By his/her conduct acts against the interests of the Union;

iii) Misappropriates or fraudulently receives any money, funds or property of the Union or makes any false declaration in regard thereof;

iv) Being an elected office-holder of the Union, refuses or neglects to perform any duty properly imposed upon him/her;

v)

b) In cases referred to the NEC under a) iii) and a) v) above, the NEC shall have the authority to suspend the member immediately from holding office or representing the Union in any capacity pending the outcome of an investigation. In the event of a complaint under a) iii) above being upheld, and in the absence of any other penalty, the member concerned shall continue to be barred from holding office until outstanding monies have been recovered.

c)

Rule 17 (Appeals Procedure)

a) Individual Discipline

i) Appeals against a disciplinary action by the NEC shall take place in accordance with the following paragraphs of this Rule.

ii) A appeal shall in the first place be addressed in writing to the General Secretary within 30 days of receipt of the NEC decision.

iii) The General Secretary shall prepare a full set of papers for each member of the Appeals Court and the appellants. This shall consist of all written material received from the Branch and the appellant relating to the original investigation, the National Executive Council decision and the request that the Appeals Court should consider the complaint.

iv) The Appeals Court shall normally meet within two months and consider only the material before it except that the appellant has the right to address the Court. The appellant may be accompanied by a member of the Union who shall be entitled to assist in the presentation of his/her case. If the appellant chooses not to appear or fails to appear without reasonable excuse, the Appeals Court shall proceed to consider the case.

v) The decision of the Appeals Court shall be final. It shall be communicated to the appellant, Branch and the NEC and shall be reported to the next Annual Conference.

b) Allegation that the NEC or Conference has acted ultra vires the Rules

i) The appeals machinery as outlined in succeeding paragraphs shall be used only

in respect of an appeal by a member that the NEC or Annual Conference has acted ultra vires the Rules in a manner which affects the member as an individual, or affects a category of members of which the member is a part, or affects the whole membership, and providing always that the decision which is the subject of the appeal is still operative.

ii) An appeal shall in the first place be addressed in writing to the Branch Secretary.

iii) Upon receipt of an appeal, the Branch Secretary shall inform the General Secretary who shall draw the appellant's attention to the provisions of Rule.

iv) The Branch Secretary shall include the appeal as a special item of business on the next monthly Branch General Meeting notice.

v) The Branch shall consider the appeal as submitted and determine any recommendation or report it wishes to make for the attention of the NEC.

vi) Within 14 days of the Branch meeting, the Branch Secretary shall forward a copy of the appeal, together with a copy of the original complaint, a copy of the notice calling the Branch meeting, a copy of the relevant Branch decision and any report or recommendation as determined under v) above, together with other relevant material to the General Secretary for the attention of the NEC.

vii) The NEC shall consider the material and make a decision which shall be conveyed to the Branch and to the appellant by the General Secretary, who shall also inform the appellant of the right to pursue the complaint to the Appeals Court, notwithstanding any view which the National Executive Council might hold as to the validity of the complaint.

viii) A request to pursue the complaint to the Appeals Court must be received within

30 days.

ix) *The matter will then be dealt with in accordance with a) iii) to v) above.*

Rule 34 (Functions and Powers of the NEC)

a) The duties of the NEC shall consist of the general management of the affairs of the Union. The NEC shall have authority over Branch Councils and Committees, Regional, District and Area Committees and District Councils within the Rules, Regulations and policy of the Union, and, between meetings of the Annual Conference, shall be the arbiter in respect of interpretations of the Rules, Regulations and policy of the Union. The National Executive Council shall have authority to issue Regulations for the administration of Rules; any such Regulations shall be reported to the next Annual Conference which shall decide whether the Regulations shall continue to apply.

b) The National Executive Council shall have power to order a special audit of the books and accounts of any Branch, Region, District or Area, should it be deemed necessary and shall be empowered to institute legal proceedings against any officer or member who withholds any books, accounts or property, or fraudulently uses any money or monies of the Union.

The National Executive Council shall also have power to take any action it considers necessary, including a fine, expulsion or legal proceedings, against any member who, in its opinion, claims or receives any benefit from the Union dishonestly.

c)

Rule 39 (Regional Councils)

a)

b)

c)

d) At Annual Meetings of the Council a President, Secretary, Treasurer, Health & Safety Officer and Education Officer shall be elected from the Branch delegates elected to the Regional Council for the ensuing 12 months. The President, Secretary and Treasurer shall each have one vote in the Regional Council's decisions at that meeting only. In the case of a tie, the President shall also have a casting vote. The Branches from which the President, Secretary and Treasurer were originally elected shall elect another delegate to the Council to ensure voting representation.

e) ”.

1.12 That then is the relevant legislation and union rules. I now set out the facts and arguments put by the parties and the reasons for my decision.

Facts

2.1 In the election for the Mayor of London the Labour Party decided on the use of a ballot to select a Labour Party candidate for London Mayor. To participate in this ballot it was decided that organisations and trade unions must be affiliated to the Greater London Labour Party, such affiliation being obtained by the payment of an annual affiliation fee. It was decided that, for the purpose of this ballot, affiliated bodies must have been affiliated in 1998, which meant that they must have paid their affiliation fee during 1998. For various reasons, which do not concern me, the affiliation fee for 1998 for the London Region of the MSF was not paid until

31 July 1999. The result was that members of the London Region of the MSF who had contributed to the union's political fund were unable to vote in the ballot to select a Labour Party candidate for the Mayor of London election.

2.2 In light of this, the MSF London Regional Council decided to mount a legal challenge against the decision of the Greater London Labour Party to exclude its members from the ballot for candidate for London Mayor. The MSF advised the London Regional Council that it had no power to commence legal proceedings and in so doing it exposed the MSF to costs for the legal action. In the event the action, which was lost, was taken by six MSF members acting as individuals.

2.3 As a result of the disenfranchisement of London MSF members arising from the failure of the London Regional Council to pay the affiliation fee and the possibility of a legal challenge by the Regional Council, the MSF National Executive Council("NEC") at its meeting on 13 November 1999 resolved, amongst other action, that with immediate effect: - "As defined by Rule 39 d), the President, Secretary and Treasurer of the London Regional Council be suspended;" and; "An Investigation Committee of Christine Casseldine, Dave Houlistan and Colin Crane be appointed with Lucy Anderson as Secretary."

2.4 Following an initial report from the Investigation Committee the MSF NEC at its meeting on the 15 April 2000 agreed to proceed to the disciplinary process in respect of the matters investigated.

The Applicant's Case

2.5 In opening for the complainant Mr Todman referred to Policy Motion 1 which had been passed at the 1999 Annual Conference. This motion, which sought to eliminate some of the bad practices and procedures which the NEC had been adopting in its investigations, instructed the NEC to reform its procedures as a matter of urgency to eliminate the abuses that had been identified. The rules of the union made it clear that the Annual Conference was the supreme governing body of the union and the NEC, along with other bodies of the union, were bound to give effect to such directions as Conference may determine. It was the understanding that that motion should have been given immediate effect and whilst the NEC apparently supported the motion it failed to implement it until April 2000. As the motion dealt with investigations and disciplinary procedures, it was important to Ms Michie.

2.6 Mr Todman stated that the evidence confirmed that the affiliation fee for 1998 for the London Regional Council had been paid on 31 July 1999. The evidence also showed that in previous years the affiliation fee had also been paid late without any concern being expressed either by the Greater London Labour Party or by MSF Head Office. Once it became evident that members in London Region would not get a vote the union adopted a high profile exercise involving the press and criticising the London Region officers. A lead role was taken in this by the MSF General Secretary and there were several exchanges of correspondence on the matter, mainly between the General Secretary and Hugh MacGrillen, Secretary of the London Region Council. Only some of the correspondence was copied to the other officers of the London Region and it was stated that Ms Michie was not involved in the exchanges and initially was not aware of the developments. Once she became aware of the situation that was developing between London Region and the union she sought to attend, with Mr MacGrillen,

the NEC meeting due to be held on 13 November 1999 to explain and resolve the situation. That request was not met. Before the NEC meeting of 13 November an assurance had been given that union funds would be not used to fund the action against the Greater London Labour Party.

2.7 Mr Todman stated that the rule book provided no specific guidance on the duties of the President of a Regional Council. Rule 42 j) which referred to the role of the Branch Chair/President, could be taken to apply to a Regional President. This merely provided for the President "...to preside over all Branch and Committee meetings and to ensure that business is conducted in accordance with the rules." The evidence illustrated Ms Michie's limited involvement both in the disenfranchisement of the London Regional members and the subsequent proposed action by the Region. This lack of involvement confirmed the complainant's understanding of her role as President which, in line with the rules of the union, was to chair meetings of the Regional Committees.

2.8 For the complainant Mr Todman stated that the union had been advised, in a letter to the General Secretary regarding possible disciplinary action in this matter, of the need to ensure that the rules of Natural Justice were complied with in instigating any disciplinary proceedings. It was Mr Todman's view that, in the light of the action subsequently taken, this advice had either not been passed on or had been ignored. The NEC were not interested in adopting procedures to understand the situation only to suspend various individuals. The only rule referred to in the minutes of the NEC meeting of 13 November dealing with the suspension of the London Regional officers was Rule 39 d). This was inappropriate as the rule

dealt only with the establishment of a Regional Council not disciplinary matters. At a subsequent meeting of the NEC the minutes dealing with the suspensions were amended to include Rule 3 d) and Rule 16 b).

2.9 The same day that the NEC voted to suspend the London Regional officers the General Secretary wrote to Mr MacGrillen advising him of the suspension. No letter, Mr Todman stated, was sent to Ms Michie until two days later when a circular letter was sent to her and two others and which included a copy of the letter of 13 November to Mr MacGrillen. Also included was a copy of a further letter from the General Secretary to Mr MacGrillen which stated that the action reported in the letter of 13 November "... has been taken under the provisions of Rules 16 a) iii), 14 c) and 34 b)." It was not clear, Mr Todman stated, that the General Secretary had authority to interpret the NEC decision by adding further rules which were not specified in the original NEC decision, but this letter marked the beginning of a sequence of changing the rules under which disciplinary action was being taken.

2.10 It was not until the 19 November 1999, Mr Todman claimed, that a letter was sent to Ms Michie, advising her formally that the suspension relating to Mr MacGrillen also applied to her. As no mention was made of the rules under which the suspension had been made, nor were details given of any charges, Ms Michie sought further information from the General Secretary. In the absence of a response for further information, Ms Michie, on the 24 November then instituted an appeal against her suspension from office. On the 13 December 1999 Ms Michie's branch, the Central London Health Branch 0023, endorsed a letter of appeal from her against her suspension and forwarded their support for her to the General

Secretary seeking information on the next stages of the appeal process. In the meantime, in a letter of the 6 December, Ms Michie was advised that her suspension had been made under the provisions of Rule 3d), Rule 16 a) iii), 14 c), and 34 b).

2.11 Mr Todman argued that these rules were clearly not appropriate. Rule 16 a) iii) dealt with disciplinary matters in relation to the misuse of the funds of the union (see para 1.11 above). An assurance had been given that the funds of the union would not be used to fund the legal action and there was evidence to support this. Rule 14 c) (see para 1.11 above) provides for the suspension of officeholders facing disciplinary procedures under Rule 16. At that time, it was argued, Ms Michie was not facing disciplinary action, the NEC had only resolved to carry out an investigation. Rule 34 b) (see para 1.11 above) was also not appropriate as it provided for the executive to order a special audit and to take action in certain well-defined circumstances which did not apply in this case. It was also argued that these rules were additional to the one specified in the original motion providing for her suspension.

2.12 In a letter of 16 December it was confirmed to Ms Michie that her suspension had been made under, what were, a different set of rules. On this occasion the rules quoted were Rules 3 d), 16 b) and 39 d) and these were in line with the amended motion agreed by the NEC. Throughout this time, Mr Todman stated, information had been sought by Ms Michie regarding a) the charges against her; b) the rules under which the NEC investigation was to be conducted; c) the terms of reference of the NEC investigation; and d) the outcome of the NEC review of the investigation procedure following the conference resolution on this matter. Apart from setting out the rules, which had been subject to a number of changes, under which

Ms Michie had been suspended, none of the requested information had been provided. This, Mr Todman argued, was a breach of natural justice. It was quite reasonable and appropriate and in line with natural justice for Ms Michie to seek information relating to both her suspension and the investigation that was being conducted.

2.13 Subsequently, in a letter dated 17 April, Ms Michie was informed that, after consideration of the report from the investigation panel, the NEC agreed to endorse a number of recommendations that had been made in the report resulting in her suspension from any office within the union. In conjunction with this she would also face disciplinary proceedings. Apart from a copy of the NEC minutes dealing with its decisions in this matter, no details of the allegations were produced. This, Mr Todman argued, was contrary to both the Conference Motion, which had sought to reform some of the practices adopted in the disciplinary procedures, and to the rules of the union. It also breached natural justice. Ms Michie had previously been told that there were no charges, only an investigation, but now found herself facing charges.

2.14 Following this further requests were made by Ms Michie for details of the charges against her, the full report of the investigating committee and the Disciplinary Committee's remit. In response to this she was eventually informed in a letter of 2 May, some six months after her original suspension, of the details of the charges against her. This, Mr Todman stated, was clearly a breach of the union rules as well as a breach of natural justice.

2.15 Mr Todman also argued that the report of the investigating committee was biased and the

way it had been presented to the NEC was contrary to natural justice. There were omissions in the report which clearly put Ms Michie at a disadvantage. No union money had been used and there was no indication of this in the report. Whilst agreeing with the statement that individuals were liable there was no evidence of any use of union funds. It was stated that costs would be met by individuals and not union funds yet Ms Michie's was being charged with misappropriation of union funds. Mr Todman also stated that the full report of the investigating committee had not been made available to the NEC prior to its meeting. The full report consisted of 140 pages and dealt with six people covered by the investigation whereas only a shortened report was presented to the NEC.

2.16 Suspension under Rule 16 required a complaint to exist. There was no record in the NEC minutes of any individual complaint against Ms Michie. Mr Todman further argued that suspension under Rule 16 b) applied to misappropriation of funds under Rule 16 a) iii) (see para.1.11 above). There had been no misappropriation of funds and, if the union were to apply this rule, it should apply it equally and fairly to actual misappropriation of funds rather than to possible misappropriation at some time in the future. It was inappropriate to apply Rule 16 b) when there had been no misappropriation. It was also contended that having voted for suspension and disciplinary action at the April NEC meeting it was inappropriate for those NEC members to be part of the Disciplinary Panel.

2.17 Mr Todman further argued that the use of Rule 3 d) was also inappropriate. This rule (see para. 1.11 above) can only be used in suspensions or “other matters not otherwise provided for in the Rules.” Rule 16 b), which the NEC had used, is a specific rule. In support

of Ms Michie case, Mr Todman cited the case of *Radford v NATSOPA* [1972] ICR 484 which, he claimed, made it clear that a union could not rely on an assumed breach of rule when there was no evidence of that breach.

- 2.18 In response to questions, Mr Todman confirmed that part of Ms Michie's complaint rested on the fact that on the 24 November she had lodged an appeal under union rules against her suspension. Rule 14 c) (see para 1.11 above) appeared to give officeholders the right to make such an appeal. The union had declined to permit such an appeal until the disciplinary process had been completed. This, Mr Todman claimed, was unreasonable because it permitted the union to delay such proceedings for a number of years effectively denying the officeholder from office for that period. Mr Todman also confirmed that because of the failure by the union to clarify certain matters relating to the investigation and to confirm that the investigation would follow the procedures as set out in the Conference Motion, Ms Michie had not attended the Investigation Committee held on 21 January 2000.

The Union's Response

- 2.19 In opening the union's response, Mr Ettinger drew my attention to two previous cases, *Equity v Goring* [1978] ICR 791 and *Wise v USDAW* [1996] IRLR 609. These cases, he said, would assist in setting out the approach that I should adopt in interpreting union rules. In *Equity v Goring* this statement is made; "*While it cannot be said that the rules are a fine example of legal drafting, I do not think that because they are rules of a union different canons of construction should be applied to them than are applied to any written documents. Our task*

is to construe them so as to give them a reasonable interpretation which accords with what in our opinion must have been intended.”

2.20 This was further clarified in *Wise v USDAW* where the following statement appears; “*The effect of the authorities may, I think, be summarised by saying that the rules of a trade union are not to be construed literally or like a statute, but so as to give them reasonable interpretation which accords with what is the courts’ view they must have been intended to mean bearing in mind their authorship, their purpose and the readership to which they are addressed.*” Normally in interpreting legal documents a literal interpretation was required but a slightly different approach should be taken with regards to union rule books where a reasonable interpretation needs to be applied. Mr Ettinger also stressed that my role was to determine whether or not there had been a breach of rules and not the substance of the issues.

2.21 Mr Ettinger outlined the evidence that was before the NEC meeting of 13 November. There was a number of letters which included the statement that “.. the Regional Council had insufficient funds to pay our dues to the GLLP during most of each calendar year.”; a clear indication that legal action was being taken by the Regional Council; no undertaking had been given to withdraw that action. There was concern with the action the Regional Council were proposing to take. Rule 39 set out the duties and activities that a Regional Council could undertake. It also set out how the funds of the Region might be applied. There was no authority to institute legal action or to obtain legal advice.

2.22 In addition Mr Ettinger also stated that in September 1999 the NEC had cause to issue a very

firm letter to the Chair and Secretary of the London Region regarding their conduct, lack of guidance and stewardship of the Regional Council, warning that any such action in the future would be taken extremely seriously. There was also concern that statements from the region concerning the funds available to pay the affiliation fee did not reflect the true position. Against that background the NEC meeting in November were faced with suggestions that financial wrong doings had or were taking place in the London Region. Representations had been made and whilst it was recognised that categorical assurances had been given, regarding the expenditure of union funds on legal action, the NEC were not bound to accept them. It was the duty of the Regional Officers to ensure that the region conducted itself within the rules of the union. In the situation the NEC was facing it had to focus on the office holders.

2.23 At the November NEC meeting the decision was therefore taken to suspend the Regional Officers, as defined by Rule 39 d). The suspension was not under Rule 39 d) but under the power that the NEC had to suspend. The purpose was to facilitate an investigation and was not part of a disciplinary process. Details of the terms of the investigation had been set out and a copy had been sent to Ms Michie on 22 November 1999. Following completion of the investigation and the consideration of the investigation report, the second decision to suspend, as part of the disciplinary process, was taken in April 2000.

2.24 Rule 16, Mr Ettinger explained was the main rule in dealing with disciplinary matters. Under this rule the NEC had considerable powers. It provided for the NEC to take action against those whom “in its opinion” had acted contrary to the rules. It was not a question of “beyond reasonable doubt” or “on the balance of probability”, merely “in its opinion” which is a

subjective test. However, Mr Ettinger stressed that at the November meeting the union had not reached a decision whether anyone should be disciplined under this rule. Rule 16 a) ii) provided for the NEC to act against anyone who “*By his/her conduct acts against the interest of the union;*”. This, Mr Ettinger argued, meant that the NEC was not limited to acting only in instances where there had been a breach of rule.

2.25 Turning to Ms Michie’s first area of complaint Mr Ettinger said that the power to suspend was contained in two rules. Under Rule 16 b) the NEC had power to suspend immediately, in two instances, including misappropriation, pending the outcome of an investigation. If the union uses this rule to make a suspension there has to be an investigation. The second rule dealing with suspension was Rule 14 c). This, Mr Ettinger said, allowed the union to suspend from office, pending an appeal, an officeholder facing disciplinary proceedings under Rule 16. Referring to the *Wise v USDAW* case Mr Ettinger stated that the Rule 14 c) does not just relate to where there may be appeals against a decision under Rule 16. Under Rule 16 a) if the NEC decides that a member has offended under Rule 16 then it has the power to remove from office. There would be no point, Mr Ettinger argued, for the NEC to do this under Rule 14 c) only if the appeal came to the same decision. Rule 14 c) he argued was there to give the NEC the right to suspend officeholders when they were facing disciplinary procedures under Rule 16. The right of appeal under Rule 14 (c), in his view, only came into effect during disciplinary proceedings and related to the individual’s response to the charges that had been laid against them.

2.26 Mr Ettinger conceded that there had been some confusion in the correspondence about the

basis for Ms Michie's suspension but the union contended that it was clear that the union had powers of suspension under Rule 16 b) and Rule 14 c). The President of a Regional Council was clearly the most responsible position within the region and, in the situation where the region was taking action beyond its remit, the NEC decided that it was appropriate to take the action that it did against Ms Michie. It was accepted that immediate suspension was provided only under Rule 16 b) in respect of matters arising under Rule 16 a) i) and iii).

2.27 In response to the suggestion that the rules of natural justice had been breached in failing to identify the charges that Ms Michie faced, Mr Ettinger stated that the union had set out, in its letter of 22 November 1999 the basis of the investigation that the NEC had requested. At that point the stage had not been reached where disciplinary charges could be laid. Rule 16 b) provided some protection to members in that it required an investigation to follow any suspension. Once the investigation was completed, the NEC at its April meeting took the decision to commence disciplinary proceedings and Ms Michie was notified, in a letter of 2 May of the charges against her.

2.28 It would have been inappropriate and premature, the union argued, to have advised Ms Michie of the nature of any charges that she might have to face prior to the investigation report. This would have clearly demonstrated that the NEC were pre-empting the report of the Investigation Committee. The union added that, whilst it was no doubt frustrating not to know what the charges might be, the charges, if any, could only be laid once the investigation was completed. An investigation was not disciplinary proceedings and, Mr Ettinger argued, natural justice was not an issue until the disciplinary proceedings were commenced.

2.29 Rule 17 b) (see para.1.11), Mr Ettinger stated, is the rule dealing with Ms Michie appeal against the suspension, the contention being that in carrying out the suspension, the union had acted outside its powers. The rule sets out the procedure to be followed and at Rule 17 b) vii) it is provided that the NEC shall consider the material and make a decision. The NEC decided not to do that pending the outcome of the investigation. Whilst Rule 17 b) does impose time scales, the union argued, within the procedure there is no time constraint in respect of the NEC's action under Rule 17 b) vii). The difficulty that the NEC faced was a situation where an investigation was under way and the question to be addressed was whether the NEC had power to take the decision that it did.

2.30 It was argued that, if Ms Michie's appeal against suspension went forward then it would be necessary for the Appeal Court to consider all the matters, information and factual background that formed the basis for the NEC's decision to suspend. The outcome of such a consideration could have jeopardised the investigation or any subsequent action that might follow, particularly if the Appeal Court found against Ms Michie in the matter of her suspension. Even more important, if at the end of the Rule 16 disciplinary process Ms Michie was disciplined in any way there would be a right of appeal to the Appeal Court. The Appeal Court would then be covering the same, or similar, ground that it had already covered in respect of the appeal against suspension. To hear the second appeal would risk allegations of bias and to sit a second time in judgement on similar issues to the first could well breach the rules of natural justice. Thus, it was argued, Ms Michie would be deprived of an effective right of appeal against disciplinary action.

- 2.31 Mr Ettinger argued that it was in the power of the NEC to take the decision to defer the appeal. He drew attention to Rule 34 a) (see para.1.11 above) which provides for the NEC, between meetings of the Annual Conference, to “... *be the arbiter in respect of interpretation of the Rules...*”, and to Rule 3 d) (see para.1.11 above) which provides for the NEC “.. *by Resolution, provide for all matters not otherwise provided for in the Rules.*” The decision, Mr Ettinger stressed, was not an arbitrary, off hand or capricious one, but one reached after careful consideration of the issues and one which was in the powers of the NEC.
- 2.32 Turning to the matter of whether the NEC had acted in accordance with the Conference Motion on investigations, Mr Ettinger accepted that, under Rule 19 b), the Annual Conference was the supreme governing body of the Union. He explained however that it was important to note that the procedures were different for dealing with Conference Motions to effect a change of rule and for those motions dealing with policy. Rule 19 c) dealt with motions regarding rule changes and Rule 22 b) required such motions to obtain a two-thirds majority. Policy Motions were not rule change motions and Policy Motions, which under Rule 22 a) only required a simple majority, if passed did not become part of the rules of the union. The Conference Motion dealing with investigations was a Policy Motion and did not amount to a rule change. In any event, he argued, the minutes of the disciplinary panel indicate that the requirements of the Conference Motion were being closely followed.
- 2.33 With regards to the concerns expressed by Ms Michie, that the union did not have the power to proceed with disciplinary procedures because it had failed to specify particular breaches of rule in the charges that had been put to her in May 2000, Mr Ettinger referred to Rule 16.

For someone to be found guilty of an offence under this rule it was not necessary to show that a rule or object of the union had been broken. Rule 16 a) ii) provides that it is sufficient for someone to act against the interests of the union. Consequently it was quite possible for a member to keep within the rules of the union but act contrary to its interests. It was clear in his view that the allegations set out in the May 2000 letter did not go beyond the powers of the NEC. The charges in that letter reflect the decision of the NEC April meeting which had considered the result of the investigation that had been carried out into these issues.

2.34 In response to the points made regarding the *Radford v NATSOPA* Mr Ettinger said that case referred to a situation where a union had reached a final decision in its disciplinary process. With regards to the present case there was still some way to go before that position would be reached. The MSF Disciplinary Panel had yet to reach a decision in these matters and the *Radford v NATSOPA* case was only relevant once such a decision was reached.

2.35 Mr Crane, in response to questions, stated that in his experience all the officers in a region would be fully informed of, and involved in, matters as important and critical as those facing the London Region in respect of the London Mayoral candidate's selection. It would be unusual if the correspondence between the parties had not been copied to all the officers. With regards to the role played by the General Secretary in these matters, whilst he was in a position to express a view, to give guidance and make recommendations, the final decision in any matter would rest with the members of the NEC who would reach decisions on the basis of the information thought to be relevant and which was before them. In not every case was the General Secretary's recommendation followed.

2.36 Regarding the matter of bias in the investigation, Mr Crane stated that the Investigation Committee had received 139 written items of evidence which had been considered. The Committee would have welcomed the opportunity to have considered this evidence with, and to have received comment on it from, the officers concerned. However none of those who were the subject of the investigation chose to meet with the Committee. Mr Crane also stated that Conference Motion previously referred to had been passed to the union's General Purpose and Finance Committee which had set up a working group to consider it. A report on Investigation Protocol was subsequently produced and endorsed by the MSF 2000 Conference. The report was endorsed after the Investigation Committee had started its proceedings. Nevertheless it had been aware of the deliberations and had incorporated many of the subsequent recommendations in its procedures. With regard to the references that had been made by the union to Rule 3 d) (see para.1.11 above) it was stated that the NEC had relied on this rule to give it authority to interpret any rule where there might be an ambiguity. It was accepted that this rule did not permit the NEC to override other clear provisions in the rule book.

2.37 Mr Crane confirmed the view that the NEC had adopted the position that the use of funds by the London Region on expenditure, which fell outside of their remit, coupled with the possibility that that expenditure might incur the MSF in additional costs, was a possible misappropriation of funds. The NEC considered that the matter was a serious issue which demanded firm and effective action.

Reasons for my Decisions

- 3.1 I am satisfied that the union had adopted the following model in its disciplinary procedures. The first stage, where appropriate under rule, suspension, followed by investigation, then disciplinary action, if necessary, followed by penalty and appeal. I am also satisfied that the rules of the union permit an appeal to be made against suspension and I will deal with this point later.
- 3.2 I have no doubt that, at the time of the first suspension in November 1999, the union had sufficient power to make a suspension and to put into place an investigation. I am satisfied that Rule 16 b) gives the union the power to act in the way it did. However, having said that, the union got itself into a terrible muddle about which rules were being followed. The union felt that firm and effective action was called for and it is a pity that, in taking the action that it did, it did not demonstrate a clear understanding of the rules it was proposing to use. Rule 3 d) is clearly there to enable the NEC to make decisions in respect of matters on which the rules are silent and should not be used to justify the application of the rules in a certain way. Despite this confusion the subject matter of the investigation was quite clear and by the 16 December Ms Michie had been correctly informed of the rules being implemented.
- 3.3 An investigation is just that, an enquiry into what has taken place. Whilst it is important to set out its remit, an investigation does not require the same precision of charges as disciplinary proceedings. Therefore by the time of the first hearing of the Investigation Committee on 21 January 2000, I am satisfied that Ms Michie had been given sufficient information to allow the investigation to proceed. It is a pity that none of the officers concerned availed themselves of the opportunity to meet with the Investigation Committee but, in any event, I find that the union has not breached any rules in not setting out charges at the time of the investigation.

3.4 I turn now to the complaint that the disciplinary procedures were not conducted in accordance with Policy Motion 1 of the 1999 Annual Conference. I am satisfied that, as the name indicates, this was a motion relating to policy and did not constitute a rule of the union. The motion was an instruction to the NEC which took action to implement it with the result that an Investigation Protocol was adopted at the following year's Conference. Therefore I find that there has been no breach of rule in this matter.

3.5 With regards to the question of whether there was sufficient evidence arising from the investigation to enable the NEC to further suspend Ms Michie and to make the charges it did I have to say that the union took a fine line. However I have to determine whether the NEC acted in breach of rule, on the evidence available and in these particular circumstances. I am of the view that there was no breach of rule in respect of this matter. In my view the intention of the union and its members in framing that rule would have been to authorise the NEC to act as it did in these circumstances.

3.6 I now deal with the complaint that the union failed to deal with Ms Michie's appeal under Rule 17 against her suspension. I have to determine whether the NEC's decision to defer her appeal was reasonable. The union's rules set out a detailed procedure to be followed in disciplinary procedures. Rule 17 b) provides the right of appeal in respect of allegations that the NEC has acted ultra vires the rules. Ms Michie made such an appeal and, in accordance with the rule, the NEC considered it. However the NEC, using Rule 3 d), decided to hold all such appeals in abeyance until the disciplinary procedures had been completed. The argument being that there was a possibility that the union procedures, if the appeal was heard, would be prejudicial to the applicant's rights.

3.7 I am satisfied that the rules of the union clearly provide for the right of appeal and that right of appeal, in the matters of suspension, are set out in both Rule 14 c) and Rule 17. The union have accepted that Rule 3 d) did not permit the NEC to override clear provisions in the rule book (para. 2.36). The rules on appeal are quite clear. The right provided by those rules is meaningless if the union has a right to overrule it *sine die*. In deferring the appeal the NEC were effectively rejecting that appeal. Once the disciplinary procedures had been completed, the individuals would either be cleared or would face a penalty. In either instance an appeal against the original suspension during the investigation would be academic.

3.8 An appeal which has been properly made under Rule 17 should not be prejudicial to disciplinary procedures. No prejudice, in my view, would arise if both the appeal and the disciplinary procedures were properly carried out under the principles of natural justice and in accordance with rule. Rule 18 e) provides that the Appeals Court should be chosen from panels in rotation. It specifically provides that “*No member who has been involved in previous proceedings relating to a particular case shall serve on the Appeals Court dealing with that case.*” The appeal that Ms Michie made was that the union, in suspending her, had acted *ultra vires*. Such an appeal would need only to deal with her suspension and not the merits of the case against her.

3.9 The right of appeal against suspension is set out in Rule 14 c) and Rule 17 and neither of these rights have been permitted. Both rules dealing with suspension envisage a right of appeal to a body consisting of lay members. Those members would be better positioned to

judge whether, in the context of the union's overall practice, suspension was a reasonable response. The decision of the NEC to defer the appeal was in effect a decision not to allow the appeal to proceed. I therefore find against the union in that, by postponing Ms Michie's appeal until all relevance of that appeal had been lost, the union effectively denied her the right of appeal.

3.10 One further point arises for my consideration. I have stated that at the time the decision to suspend was made there was no breach of rule. However a suspension is a continuing action and part of its ongoing validity is by reference to the rule book as a whole and the right of appeal. Indeed rule 14(c) specifically refers to appeal and describes suspension as "pending an appeal". The rule book further states that an appeal shall normally be heard within two months. By denying that appeal the suspension can no longer be regarded as being legitimately within rule.

3.11 It is for these reasons I find MSF has breached Rule 14(c) and Rule 17(b) of its rule book.

3.12 I have given this matter careful consideration and, in view of the denial of what I believe is Ms Michie's clear right to an appeal against her suspension, I have made the enforcement order on the union. At the hearing Mr Ettinger indicated that the MSF would respond positively should I make a declaration and issue an enforcement order.

E G WHYBREW
Certification Officer