

OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

IN RE: DAN VIRTUE and)	Protest Decision 2007 ESD 403
CARLOS RAMOS,)	Issued: July 9, 2007
)	OES Case Nos. P-07-370-013007-HQ
Protestors.)	and P-07-371-013007-HQ
_____)	

Dan Virtue and Carlos Ramos, members of Local Union 776, filed post-election protests pursuant to Article XIII, § 3 of the Rules for the 2005-2006 IBT International Union Delegate and Officer Election (“*Rules*”). The protests alleged that they were improperly discharged from their positions as appointed International Representatives for the IBT because of activity protected by the *Rules*. These protests were consolidated for investigation and decision.

Election Supervisor representatives Steven R. Newmark and Jeffrey Ellison investigated these protests.

Findings of Fact

1. The Protestors’ Positions, and the Terminations

Protestor Virtue is the elected president and a business agent of Local Union 776. Protestor Ramos is an appointed business agent for the local union. For the past several years, Virtue and Ramos also served as appointed International representatives. In those latter capacities, both also held appointments in the International Union’s freight division. Virtue served as Eastern region freight coordinator from April 2001 until July 2006, when he was designated Eastern region freight co-coordinator with another International representative. Ramos served as chair of an Eastern region freight committee since 2001. Both assert that they performed their functions as International representatives in an exemplary manner.

Despite such performance, each received a letter from General President Hoffa dated January 26, 2007 dismissing him from his position as International representative. Each letter stated the following, in relevant part:

In reviewing the IBT’s staffing needs for the coming year, I have decided that your services as an International Representative, as well as in any appointed positions you hold in the Freight Division, are no longer needed. They include your appointed positions on the Eastern Region Freight Committee, the Eastern Region Review Committee, the National Review Committee, the National Grievance Committee and the National Negotiating Committee. The current stipend arrangement covering you will terminate effective on January 31, 2007.

The International Union is grateful for your past service and I am confident that you will be able to continue to serve the Union and its membership in your current position with Local 776.

Virtue and Ramos each asserted that his dismissal was in retaliation for activity protected by the *Rules*. Virtue stood for election as International vice president for the Eastern region. Ramos seconded Virtue’s nomination at the IBT convention and chaired his campaign committee.

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Virtue was defeated for that office by Hoffa slate candidates. The tally of ballots was completed on November 18, 2006. We certified the election of the winning candidates on January 8, 2007. This protest was filed at the end of January, after the election certification and after the IBT had terminated Virtue and Ramos.

Virtue and Ramos claimed that their dismissal as International representatives was predicted by high ranking officials of the IBT as early as July 2006. Thus, Virtue asserted that his designation by General President Hoffa as Eastern region freight co-coordinator (instead of coordinator) on July 14, 2006 was in response to his candidacy for International vice president, stating that all other IBT regions have freight coordinators, just as the Eastern region did prior to Virtue's nomination for International office. Virtue and Ramos also asserted that Ed Keyser, International representative and administrative assistant to the General President, and Bill Hamilton, International representative and Local Union 107 president, separately told them that they would likely lose their International representative positions if Virtue lost his election for International vice president. Keyser and Hamilton each told our investigator that they discussed with Virtue his candidacy and his prospects for election, which they regarded as unlikely; both denied that they predicted that Virtue and Ramos would be dismissed as International representatives, further stating that they had no "inside" information of such a prospect nor were they in positions to influence such decisions.

Phil Young, outgoing International vice president and former IBT freight director, told our investigator that Virtue's performance as Eastern region freight coordinator was "excellent," in part because Virtue had significant understanding of the intricacies of the various supplements to the National Master Freight Agreement that were in effect in the Eastern region and because he had excellent rapport with the freight local unions in that region. Young asserted that International vice president Walt Lytle told him that Virtue would likely lose his International representative if he lost the election for International vice president. Lytle agreed that he made such a comment to Young. However, he observed that it was "political suicide" for any person to seek International office as an independent candidate, stating further that his comment to Young was mere speculation and not the result of "inside" knowledge of an impending termination. Lytle also said he had no influence over the decision to retain or dismiss Virtue or Ramos as International representatives.

Tyson Johnson, International vice president and current IBT freight director, told our investigator that Virtue had good work performance as an International representative performing regional freight functions.

With this background, we investigated the process by which the decision was made to dismiss Virtue and Ramos.

2. Party Submissions

The IBT's initial response to the protest asserted that Virtue and Ramos were terminated along with a number of other International representatives in the course of the re-elected administration's review of personnel deployed throughout the union. The response cited *Finnegan v. Leu*, 456 U.S. 431, 441 (1982), for the proposition that an elected union leader has the right "to choose a staff whose views are compatible with his own." The IBT nevertheless offered to make employees identified by the protestors available for interview to ascertain facts

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relating to the terminations. A second submission by the IBT described, in detail, the bases for terminating Virtue and Ramos.

After interviewing IBT employees and the protestors, on March 28, 2007 we asked the parties for written position statements analyzing the applicable law and *Rules*, and the facts. We asked the parties to address *Finnegan*, Article VI, § 6 of the IBT Constitution (providing that “[t]he General President, when he deems it for the best interests of the International Union, is hereby empowered to remove any International Representative or General organizer”), Election Office precedent upholding the General President’s dismissal of an International employee (*Wsol*, P-095-IBT-CHI (September 20, 1995), *aff’d* 95 EAM 17 (October 10, 1995)), and the *Rules* provision for considering retaliation protests “without regard to whether the alleged violation affected the outcome of an election” (Article XIII, § 3(b)). The parties agreed to submit their statements by May 1; the statements were submitted, exchanged, and responses were also submitted. The protestors’ submissions emphasized facts and argued, consistent with their allegations, that the IBT terminated them for election-related activity. The IBT responded with its own factual analysis, and raised a new legal issue. The IBT argued that Article XIII, § 3(b) was added to the *Rules* specifically to address the Second Circuit’s decision in *United States v. IBT (Leroy Ellis)*, 3 F.3d 634 (2d Cir 1993), which held that the 1991 Election Officer lacked authority after election certification to remedy retaliation that both occurred and was protested before the certification.

3. Results of the Investigation

The results of the investigation will be summarized only briefly. We questioned IBT witnesses about each of the reasons offered by the IBT to support the termination of Virtue and Ramos. The witness accounts did not support the offered rationale.

Leo Deaner is the executive assistant to the General President, a position he has held since March 2005. Among many other duties, Deaner is responsible for reviewing and making recommendations with respect to IBT staffing. Deaner told our investigator that, in the latter part of 2006, he reviewed the status and performance of International representatives. He sought to determine whether the current staff of International representatives was deployed optimally and whether the IBT could accomplish the necessary functions performed by International representatives with a reduced staff. To those ends, he reviewed monthly activity summaries the International representatives filed to ascertain their reported work activities. He also reviewed their travel histories. In several cases, he contacted the supervisor of an International representative for answers to any questions his review raised with respect to how busy the representative was. Following this review, he recommended termination of a number of representatives to the General President. Those representatives who were direct hires of the IBT were terminated and offered severance. Those representatives holding other union employment and receiving stipends from the IBT were simply notified that their IBT employment was terminated. This process resulted in the termination of 16 International representatives, 3 between the convention and the election and 13 after the election.

In addition to those 16 terminations, Deaner also recommended Virtue and Ramos for termination. However, Deaner did not analyze the activity summaries and travel histories of Virtue and Ramos as he had the other 16 representatives he recommended for termination, nor did

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he consult with their supervisor, freight director Johnson, for his view as to their value as International representatives.

Rather, Deaner told our investigator that he recommended Virtue and Ramos for termination because they had pursued policies at odds with the IBT administration. The particular policy differences purportedly manifested in 2004, 2005, and early 2006 – all before Virtue’s nomination for Eastern region vice-president at the International Convention in June of 2006. For the 2004 matter, interviews of IBT employees Jeff Farmer and Mike Murphy showed that Virtue’s activities followed and implemented administration policy. For the later matters, interviews of Deaner and Tyson Johnson, and a review of documents (grievance panel records and certain IBT position statements) found no evidence that Virtue had acted in conflict with administration policy.¹

Analysis

Jurisdiction. We address the IBT’s argument that the Election Supervisor lacks jurisdiction to decide these protests. This was first raised in the IBT’s May 2, 2007 post-investigation submission. The IBT contends that these protests constitute post-certification allegations about post-certification conduct and, as such, are beyond the reach of the *Rules*. We find that the Election Supervisor has jurisdiction to decide the protests.

Article XIII, § 3(a) defines “post-election protests” as “any alleged improper election day or post-election day conduct or event.” According to § 3(b) of the same article, such protests “shall only be considered and remedied if the alleged violation may have affected the outcome of the election, except that any timely protest alleging improper threats, coercion, intimidation, acts of violence or retaliation for exercising any right protected by these *Rules* shall be considered and remedied without regard to whether the alleged violation affected the outcome of an election.”

Section 3(b) was added to the *Rules* apparently in response to the Second Circuit’s decision in *United States v. IBT (Leroy Ellis)*, 3 F.3d 634 (2d Cir 1993). That case involved a pre-election protest alleging retaliatory conduct by an employer. The protest was not resolved before the election, and the protestor ultimately won election as an IBT vice-president. After certification of the election results, the Election Officer granted the protest and ordered a remedy against the employer. The Second Circuit set aside the decision and remedy, holding that under the Consent Decree “the Election Officer’s authority to make this decision had expired with his certification of the 1991 election results in January.” 3 F.3d at 636.

Section 3(b) extends the Election Supervisor’s authority beyond the point of certification. The provision’s language permits us to consider and remedy “any protest” alleging “retaliation for exercising any right” the *Rules* protect. The exception is broadly stated and is not limited, as the IBT asserts, to acts of alleged retaliation that occurred before certification of the election results.²

¹ The Election Supervisor has a detailed investigative record supporting these general findings. It is not necessary to this decision, however, to discuss facts that may implicate present IBT policy positions.

² This is a question of first impression under the *Rules*. We note that Election Officer Cherkasky investigated and decided protests alleging retaliatory conduct against at-will employees where the

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Accordingly, we find we have authority under the *Rules* to decide these protests on their merits.

The merits. Article VII, § 12(g) of the *Rules* prohibits “[r]etaliatio[n] ... by the International Union ... against a Union member, officer or employee for exercising any right guaranteed by this or any other Article of the *Rules*.” Under Article VII, § 12(a), Virtue had “the right to run for office.” Under the same subsection, Ramos had the right “to support ... any candidate, [and] to aid or campaign for any candidate.” Section 12(g) prohibited the IBT from retaliating against Virtue and Ramos, whether as members, officers or employees of the union, for exercising the rights guaranteed them by § 12(a).

The *Rules* protect campaign activity, including the right to stand as a candidate, as a personal right of members. Therefore, neither the union nor an employer (including the union as an employer) may interfere with that right. *Hoffa*, P812 (August 16, 1996); *Miner*, 2005 ESD 1 (May 27, 2005). In *Wsol*, 95 EAM 17 (October 10, 1995), *affirming* P95 (September 20, 1995), the Election Appeals Master wrote:

The IBT argues that any member appointed by [the General President] to an important policy position may be replaced at any time and for any reason – even if [the General President’s] motivation for the replacement involves retaliation for the member’s decision to run for union office. *See Finnegan v. Leu*, 456 U.S. 431 (1982) (LMRDA is not violated where a union officer replaces an appointed official). However, the Election Rules are broader than federal labor law, and prohibit any retaliation relating to the exercise of member rights under the Rules, including the right to run for union office. *See Parisi*, P1095 (December 2, 1991).³

Therefore, the IBT is “prohibited from using the electoral preferences or activities of its employees as factors in any employment-related decision.” *Pope*, 2000 EAD 39 (October 11, 2000), *aff’d*, 00 EAM 11 (November 14, 2000) (denying a pre-election protest and upholding the termination of a Local Union 728 business agent in the course of the 2001 International officer election, where business agent was not a candidate entitled to protection against retaliation under the *Rules*).

The anti-retaliation provision has been read in recognition of the right and authority elected union officers have to set union policy. Past rulings have not interpreted the anti-retaliation provision so broadly as to restrict the right of union officials to conduct their business

conduct occurred after certification of the election results. *Garrett*, SR-03 (May 20, 1999); *Sherman*, SR-12 (May 20, 1999). Neither ruling, however, reflects any consideration of the jurisdictional issue raised here. The protests were denied in both cases. *Garrett*, like the present case, involved the termination of International representatives and International organizers. *Sherman* involved the termination of a secretary who was not a union member and so had no rights under the *Rules*.

³ *Wsol* denied a pre-election protest and upheld the General President’s termination of the protestor from a discretionary position on an advisory board. The termination and protest occurred before the 1996 International Union officer nominating convention.

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and exercise their full political authority. Thus, “[r]emoval from an appointed union position because of personality conflicts or political rivalry is not prohibited.” *Wsol*, P-095-IBT-CHI at 5 (September 20, 1995) (citing protest rulings). This principle is rooted in the U.S. Supreme Court’s *Finnegan* decision, which held that while the LMRDA protects union members from retaliation for engaging in speech, the statute does not restrict a union officer from removing appointed officials from office for political reasons. *Finnegan*, 456 U.S. at 440-41. See also *Brunt v. Service Employees International Union*, 284 F.3d 715 (7th Cir. 2002); *Franza v. Teamsters Local 671*, 869 F.2d 41 (2d Cir. 1989); *Cotler v. Owens*, 753 F.2d 223 (2d Cir. 1985); *Cehaich v. UAW*, 710 F.2d 234 (6th Cir. 1983); *Tucker v. Bieber*, 131 LRRM 2979 (E.D. Mich. 1989). The IBT Constitution explicitly confers discretionary authority on the elected leader of the union at Article VI, § 6, which provides that “[t]he General President, when he deems it for the best interests of the International Union, is hereby empowered to remove any International Representative or General organizer” (emphasis added).

Weighing all of the evidence, and considering the timing and nature of the employment decision these protests put at issue, we conclude that the terminations of Virtue and Ramos from their appointed positions as International representatives were not acts of retaliation prohibited by the *Rules*. The membership chooses, by referendum vote, to confer the full IBT Constitutional authority on a set of officers. After every election, the certified, elected victor has the right to elevate supporters to discretionary positions and to remove opponents from those positions. That is a question of governance and, specifically, the discretionary authority that Article VI, § 6 of the IBT Constitution confers upon the General President. Unless there is a change to the *Rules*, the IBT Constitution, or other governing law, this same principle will apply after the 2011 election and any subsequent IBT International Officer election. During the campaign, a candidate undoubtedly may take issue with governance decisions of the administration or may promise to follow certain governance practices if elected. If the members elect that candidate and endorse the electoral platform, the electoral victors may implement personnel changes using the authority conferred by the IBT Constitution.

While the *Rules* protect members’ rights to stand for election, running for office necessarily expresses policy disagreement with competing candidates (or slates) because, ultimately, only one candidate can win for each open office. Our prior decisions hold that the *Rules* do not bar removing an appointed union official based on “political rivalry.” *Wsol*, P-095-IBT-CHI at 5 (September 20, 1995) (*Rules* protect member’s right to participate in election but do not prohibit administration from terminating discretionary employee based on political opposition). Virtue lost at the polls. The *Rules* protected his right to run for office, but once the election is certified they do not shield him, or his avowed supporters, from termination from discretionary positions by the elected authority.

A different result may have been reached here had the terminations occurred at an earlier time. Cf. *Bundrant*, 2005 ESD 19 (October 25, 2005), *aff’d*, 05 EAM 4 (November 15, 2005) (granting protest that established worksite transfers were carried out in retaliation for local union officers known status as an International Officer candidate). The facts found in our investigation show that Virtue and Ramos were not terminated for the same reasons as the other 13 contemporaneous terminations, that the historical facts did not support the stated reasons for the terminations, and that Virtue and Ramos were generally respected for their work. If a termination or demotion occurs during an election campaign, the Election Supervisor may investigate in response to a protest (or in his or her own discretion) to determine if the personnel decision was

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made to gain an electoral advantage, punish an opponent, or discourage opposition in violation of the *Rules*.⁴ But the *Rules* do not bar politically-motivated, post-certification actions carried out by an elected union official exercising union governance authority explicitly conferred by the IBT Constitution.

The IBT did not impede Virtue's nomination or candidacy, or Ramos' support of Virtue, during the election. The post-certification terminations at issue in this protest, grounded in the General President's discretionary authority to appoint staff, do not violate the *Rules*.

Conclusion

For the foregoing reasons, the protests are DENIED.

Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within two (2) working days of receipt of this decision. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Supervisor in any such appeal. Requests for a hearing shall be made in writing, shall specify the basis for the appeal and shall be served upon:

Kenneth Conboy
Election Appeals Master
Latham & Watkins
885 Third Avenue, Suite 1000
New York, New York 10022
Fax: (212) 751-4864

Copies of the request for hearing must be served upon the parties, as well as upon the Election Supervisor for the International Brotherhood of Teamsters, c/o Orrick, Herrington & Sutcliffe, LLP, 666 Fifth Avenue, New York, N.Y. 10103, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

Richard W. Mark
Election Supervisor

cc: Kenneth Conboy
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⁴ We note that Virtue did not file a pre-election protest in July 2006 claiming retaliation when he was made Eastern region freight co-coordinator.

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