ELECTION APPEALS MASTER

IN RE: FRED GEGARE (After Second Remand), Protestor.	10 Elec. App. 3 (KC)

Before me is the third set of appeals arising out of IBT member Fred Gegare's June 3, 2010 protest asserting violations of the Rules for the 2010-2011 International Brotherhood of Teamsters ("IBT") International Union Delegate and Officer Election (the "Rules") by the Hoffa-Hall 2011 Campaign (the "Hoffa Campaign"). The appeals present two questions:

First, do the Rules prohibit the offer of a union resource (in this case a job) *solely* in exchange for partisan political activity or electoral advantage, or do they prohibit *any* offer of union resources conditioned on political or electoral benefits? As more fully explained below, the Rules forbid any attempt to barter union jobs for political favors. They do not contain an exception for offers conditioned on some measure of legitimate services as well as political assistance.

Second does the Election Supervisor's decision *In re: Fred Gegare (After Second Remand)*, 2011 ESD 165 (the "Remedial Order") adequately remedy the harm caused by the fact that, as determined by the Election Supervisor, in this case several IBT officials did attempt to exchange union jobs for activities that would benefit the Hoffa Campaign? The Election Supervisor ordered the violators to cease and desist from their improper conduct. He further imposed measures to publicize their Rules breaches and reassure the IBT electorate that manipulation of union resources for political gain is not permitted. Because of my conclusion on the first issue in this appeal, the cease and desist order and the notice distributed to IBT members

must be modified to correctly state the standard of conduct under the Rules. However, in all other respects, the Election Supervisor's remedial measures are adequate.

Therefore, as fully explained below, the Remedial Order is affirmed in part and reversed in part.

I. Background

For a full description of the facts and procedural history in this case, see the Election Supervisor's decision *In re: Fred Gegare (After Remand)*, 2011 ESD 73 (Jan. 20, 2011) (the "January 2011 Decision"), *In re: Fred Gegare (After Remand)*, 10 EAM 3 (Feb. 16, 2011) (the "February Appeal Decision"), and the Remedial Order. Here, a brief summary of the proceedings to date will suffice.

A. The January 2011 Decision and the February Appeal Decision

The January 2011 Decision set forth the results of a six-month investigation into alleged Rules violations on the part of the Hoffa Campaign. It concluded that four elected IBT officials had offered union jobs to potential 2011 candidates for elected office in exchange for political support. Specifically, James Hoffa, Jr. (General President of the IBT), Tyson Johnson (Southern Region Vice President of the IBT), Rome Aloise (IBT West Region Vice President of the IBT), and Ken Hall (Vice President at Large and Package Division Director of the IBT), each a member of the Hoffa slate for 2011, attempted to use the offer of union jobs to buy allegiance to the Hoffa campaign and eliminate electoral challenges to Hoffa slate candidates. These efforts failed only because the intended recipients rejected each of the offers. February Appeal Decision at 5.

The January 2011 Decision determined that these IBT officials came close to breaking the Rules, but fell just shy of a violation because honest men rejected the proffered political

enticements. The Election Supervisor acknowledged that the Rules ban misuse of union resources for political ends. However, he concluded that they do not prohibit mere *attempts* to do so, because the literal four corners of the text of the Rules do not mention "attempts." The January 2011 Decision therefore found no Rules violations and did not take any remedial action in response to what were conceded by the Election Supervisor to be, in effect, thwarted bribes.

The February Appeal Decision reversed the Election Supervisor's conclusion that the Rules had not been violated. The Election Supervisor, I explained, has broad authority under the Labor-Management Reporting & Disclosure Act of 1959 (the "LMRDA"), the March 14, 1989 Consent Decree entered in *U.S. v. International Brotherhood of Teamsters et al.*, 88 Civ. 4486 (S.D.N.Y.) (the "Consent Decree"), and the Rules themselves to interpret and apply the Rules. That authority compels interpretation of the Rules consistent with the "overriding objective" of the LMRDA to "ensure that unions would be democratically governed, and responsive to the will of the union membership as expressed in open, periodic elections." *Finnegan v. Leu*, 456 U.S. 431, 441 (1982). Accordingly, the February Appeal Decision concluded that the Election Supervisor's interpretation of the Rules was overly-literal and that "the Hoffa Campaign violated the Rules by making the job offers described in the Election Supervisor's January 2011 Decision."[1] February Appeal Decision at 14.

The February Appeal Decision recognized that elected officials must have "discretion to appoint agents of [their] choice to carry out [their] policies." *Finnegan*, 456 U.S. at 441-42. However, as explained in the February Appeal Decision, interpreting the Rules to forbid the conduct uncovered by the Election Supervisor does not jeopardize that discretion:

> [A]n elected official may offer a job in exchange for an agreement to carry out the

[1] Accordingly, the notation in the Remedial Order that the January 2011 Decision was "reversed as to remedy only" is not accurate. *See* Remedial Order at 1.

> official's policies. Under the Rules and the Consent Decree, *elected officials may not offer a job in exchange for partisan political activity, or any action designed to create an electoral advantage for the incumbent appointing officer and his campaign slate of candidates for union office.*

February Appeal Decision at 16 (emphasis added).

The February Appeal Decision remanded the case to the Election Supervisor solely for the purpose of "fashion[ing] a remedy to alleviate the harm caused by the conduct detailed in the January 2011 Decision." *Id.* The February Appeal Decision advised that the remedy should be "commensurate to the harm." *Id.*

B. The Remedial Order

On remand, the Election Supervisor devised two measures to address the harm caused by the Hoffa Campaign's conduct. First, he issued a cease and desist order to the Hoffa Campaign, instructing it to stop attempting to use union resources for political activity. The Remedial Order explained:

> The harm in this case concerns elected IBT officials who, in three identified instances, did not attend to the rule against use of union resources to aid a campaign and sought – albeit without success – to gain political support in exchange for the offered jobs and benefits. A cease and desist order addresses that harm because it clarifies the boundary of prohibited conduct, guides future compliance of those involved in the violation, and provides notice of the rule to others.

Remedial Order at 4. The Election Supervisor therefore directed the following order to the Hoffa Campaign:

> The Hoffa campaign and each candidate on the Hoffa-Hall slate are ordered to cease and desist from using union resources to conduct campaign activity. Specifically, this direction is to cease and desist from offering any job or benefit where the offeror has the authority at the time to consummate the offer and the offer is made *solely* in exchange for partisan political activity or is designed *solely* to create electoral advantage for the incumbent appointing officer and his or her campaign slate of candidates for union office.

Remedial Order at 4-5 (emphasis added). Notably, the two uses of the term "solely," in italics in

the text quoted above, did not appear in the similar language used to define the standard of prohibited conduct in the February Appeal Decision.

Second, the Election Supervisor ordered that the IBT electorate be notified of the Rules violations in this case, and of the fact that the Rules do not allow attempts to exchange IBT jobs for political gain. The Remedial Order reasoned:

> Because the interpretation of the *Rules* applied in this protest is a matter of first impression, notice of the cease and desist order will be disseminated broadly throughout the IBT. While such dissemination is far broader than the individuals involved in the *Rules* violation, this sort of conduct could occur at subordinate bodies and responsible officers and officials at all levels of the IBT should therefore be aware of the rule articulated in the Election Appeals Master's *Gegare* rulings and applied here. Providing broad notice protects the election process by alerting all within the IBT to this rule, now clearly established.

Remedial Order at 4.[2] To those ends, the Election Supervisor drafted a remedial notice describing the Rules violations in this matter. *See* attachment to Remedial Order. The remedial notice formulated the standard of conduct established by the Rules as follows:

> Under the election *Rules*, IBT elected officials at any level of the union may not offer a job *solely* in exchange for partisan political activity, or take any action solely designed to create an electoral advantage for the incumbent appointing officer or that officer's slate of candidates for union office.

Id. (emphasis added).[3]

The Election Supervisor ordered the dissemination of the remedial notice by the

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[2] In several places, the Remedial Order mentioned that this case presented an "issue of first impression." The misuse of union resources is, unfortunately, not an issue of first impression. The novelty of this case is that the targets of the offers happened to reject what were, in effect, attempted bribes. That does not excuse the misconduct at issue, which was the offers themselves.

[3] The remedial notice, like the cease and desist order, largely tracks the language of the standard of conduct in the February Appeal Decision, but it makes two key changes. First, the notice inserts the term "solely" in two places. That choice on the part of the Election Supervisor is discussed below. Second, in the third clause of the sentence, it inserts the word "take," in italics in the following quotation: "or *take* any action solely designed to create" a political or electoral advantage. The word "take" distorts the standard stated in the February Appeal Decision. The phrase beginning "any action" refers to "action" on the part of the *target* of a job offer. In other words, it refers to "action[s]" that the offeree would take in exchange for the job. It does not refer to an "action" on the part of the official making the offer. Read literally, the formulation in the remedial notice would prohibit all campaign activity, whether union resources were involved or not.

following means.

- Distribution of the remedial notice to all local union offices via first-class mail, at the expense of the Hoffa Campaign, along with an instruction to local offices to make copies of the remedial notice available on campaign literature tables;
- Publication of the remedial notice in the April 2011 issue of *Teamster* magazine, which is mailed to the home of every IBT member; and
- Posting of the remedial notice to the website www.teamster.org under a link titled "2011 Election Campaign," to be maintained throughout the conclusion of the 2011 IBT elections.

C. Appeals

IBT member Fred Halstead, as well as Gegare, now appeal from the Remedial Order. Halstead objects to two aspects of the Remedial Order. First, as noted above, the Election Supervisor reformulated the standard of conduct in the February Appeal Decision to include the word "solely" in several key places. The cease and desist order directed the Hoffa Campaign not to offer IBT jobs "*solely* in exchange for partisan political activity," or in exchange for any action designed "*solely* to create electoral advantage" for incumbent candidates. Remedial Order at 4-5 (emphasis added). Similarly, the remedial notice declared that "elected officials at any level of the union may not offer a job *solely* in exchange for partisan political activity." Attachment to Remedial Order (emphasis added). According to Halstead, the Election Supervisor's use of the term "solely" "injects a requirement of specific intent into the prohibition against future misconduct and, moreover, requires the wrongful intent to be the *only* intent . . . ." *See* Letter from Barbara Harvey, Esq., March 16, 2011, at 2 ("Halstead Appeal"). For that reason, Halstead contends that the Remedial Order "seriously misstates the legal standard." *Id.*

Second, Halstead objects to the remedial measures adopted by the Election Supervisor as inadequate. Halstead proposes that each IBT member receive by mail an audio recording of a "candidate forum," which would be a mandatory debate among 2011 candidates held prior to elections. During the forum, candidates would discuss, among other issues, the Hoffa Campaign's Rules violations. In addition, Halstead attacks the distribution methods for the remedial notice selected by the Election Supervisor. In particular, Halstead expresses concern that campaign literature at union halls "has a habit of disappearing into wastepaper baskets." Halstead Appeal at 2. Halstead therefore seeks distribution via email to all IBT email lists, as well as the placement of the notice on the home page of the official union website.

Gegare, in his appeal, requests even stronger remedial measures. Gegare demands that each of the officials who violated the Rules be disqualified from the 2011 elections. He focuses on what he terms "false testimony" given to the Election Supervisor. *See* Letter from Scott Soldon, Esq., March 21, 2011, at 8 ("Gegare Appeal"). This refers to the fact that, in some instances, the Election Supervisor did not credit testimony from the officials who made the offers. *See, e.g.*, January 2011 Decision at 24. Thus, in addition to the Rules violations themselves, Gegare asserts that the "lying/obstruction/cover-up" by the violators requires disqualification. Gegare Appeal at 8. Short of that step, Gegare seeks: (i) mailing of Gegare campaign literature to union members; (ii) inclusion of Gegare campaign literature in *Teamster* magazine and on the IBT website; (iii) an order that the Hoffa Campaign pay the costs of the Election Supervisor's investigation into the Rules violations at issue; (iv) the posting of a notice signed by the four officials who breached the Rules at all IBT members' worksites; and (v) mandatory participation in candidate forums for 2011 candidates. *See* Gegare Appeal at 8-9.

The Hoffa Campaign and the IBT oppose the appeals. Both argue that the remedial

measures imposed by the Election Supervisor will effectively cure any harm caused by the misconduct identified in the January 2011 Decision. They further assert that the Election Supervisor's remedies are entitled to deference.

I held a hearing by teleconference in this matter on March 24, 2011. During the hearing, counsel for Gegare, Halstead, the Hoffa Campaign, the IBT, and the Election Supervisor each presented oral argument on the issues raised by the appeals.

II. Discussion

A. The Standard of Conduct under the Election Rules

The first question is whether the Remedial Order accurately defined the standard of conduct under the Rules. As noted above, the Remedial Order altered the standard set forth in the February Appeal Decision, which is that "elected officials may not offer a job in exchange for partisan political activity." February Appeal Decision at 16. In contrast, the Remedial Order instructed officials not to make job offers where "the offer is made *solely* in exchange for partisan political activity." Remedial Order at 4-5 (emphasis added).

During the March 24, 2011 hearing, the Election Supervisor, via his counsel, explained his motive for introducing the term "solely" into the legal standard. According to the Election Supervisor, he wanted to protect the appointment power of elected officials. *See Finnegan*, 456 U.S. at 441-42 (stating that the LMRDA "does not restrict the freedom of an elected union leader to choose a staff whose views are compatible with his own"). In particular, the Election Supervisor worried about handcuffing that power during an election cycle. The Election Supervisor stressed the practical reality that, in filling appointed positions, officials are likely to select supporters. Supporters, of course, might want to help the incumbent's campaign. Thus, the Election Supervisor feared, the appointment of a supporter during an election cycle could be

perceived as violating the Rules.

The Election Supervisor's concerns are unwarranted. When an offer of a job is made in a manner consistent with the Rules, the recipient's acceptance of that job is contingent only upon an agreement to do the job itself. It is not contingent upon any partisan advantage or electoral benefit. For that reason, the Election Supervisor's hypothetical offer would not run afoul of the standard of conduct stated in the February Appeal Decision. In contrast, the Hoffa Campaign sought partisan political accommodations *as conditions* of the offers of union jobs. *See, e.g.*, January 2011 Decision at 11-12, 27 (describing two requests that IBT members vacate politically valuable positions and promote the Hoffa slate), 27 (describing a request for an agreement not to run against the Hoffa slate). The distinction is clear: If the terms of the deal include political favors, the offer violates the Rules; if they do not, the offer is proper.

To prevent the misconduct at issue in this case from recurring, all candidates must understand that political favors cannot form *any* part of the exchange of union resources. The legal standard adopted by the Election Supervisor fails to achieve that goal. In fact, it eviscerates the prohibition on using union resources to bargain for political support. After all, at least some recipients of jobs offered in order to gain an electoral advantage might actually be expected also to do their new jobs. In that case, the offers would not have been made "*solely* in exchange for partisan political activity," but in exchange for both political activity and legitimate job duties. Indeed, as Halstead observes, use of the term "solely" threatens to make Rules violations of this type dependent on the subjective intent of the incumbent making the offer. Whether such an offer violates the Rules cannot pivot on whether an official intended "solely" to reap a political gain, or also, for instance, to fill a job vacancy, or to further any other legitimate purpose. If that were the test, incumbents could invent a legitimate pretext for any job offer conditioned on a

partisan political benefit. To avoid that result, the test must instead be objective. Under the Rules, what matter are the terms of any proposed quid-pro-quo involving union resources, and not the state of mind of the individual making the proposal.

During the March 24 hearing, the IBT advised that it does not fear officials will be paralyzed by the standard of conduct set forth in the February Appeal Decision. That standard simply requires a case-by-case determination of facts. I have every confidence that both candidates and the Election Supervisor can distinguish the valid exercise of hiring power from electoral misconduct.

For these reasons, the Election Supervisor is directed to re-issue the order contained in the first paragraph of the "Remedy" section of the Remand Decision, beginning on page 4. That paragraph shall read as follows:

> The Hoffa campaign and each candidate on the Hoffa-Hall slate are ordered to cease and desist from using union resources to conduct campaign activity. Specifically, this direction is to cease and desist from offering any job or benefit where the offeror has the authority at the time to consummate the offer and the offer is made in exchange for partisan political activity, or any action designed to create an electoral advantage for the incumbent appointing officer and his campaign slate of candidates for union office.

In addition, the remedial notice shall be modified to appear in the form attached to this decision as Exhibit A.

B. Remedies

The remaining question is whether the remedial measures selected by the Election Supervisor will adequately address the harm caused by the Rules violations in this case. The harm to be cured is "any damage to the election franchise and the union members' faith in it" as a result of the attempted misuse of union resources. February Appeal Decision at 16.

As an initial matter, it should be noted that, despite Gegare's suggestion to the contrary,

no other types of harm are relevant to this appeal. Gegare's references to "obstruction" and "lying" ignore the fact that the record does not contain any findings about such harms. The January 2011 Decision simply resolved conflicting testimony by making credibility determinations. Such credibility determinations are standard in adversary proceedings, and are not equivalent to findings of obstruction or perjury.

In light of the actual harm to be addressed, the form of the remedies in the Remedial Order is sufficient, subject to modification of the cease and desist order and notice described above. To ensure the integrity of the electoral process, the Election Supervisor ordered the Hoffa Campaign not to repeat its Rules violations. He also sought to restore any faith lost by the IBT electorate in the integrity of the process by ordering disclosure of these proceedings. That disclosure not only reassures the electorate that the Rules prohibit even the attempted misuse of union resources for partisan political purposes, but it also demonstrates that the electoral system and the Election Supervisor are fully capable of guarding against violations of the Rules. The Election Supervisor determined that transparency about the Rules violations that occurred, and about the boundary between proper and improper conduct, is the best remedy. To that end, he ordered that the remedial notice be distributed to the home of every member of the IBT via *Teamster* magazine.

Appellants fail to demonstrate the need for additional remedial measures. They have not offered any demonstration that disclosure strikes the wrong balance among the factors to be considered by the Election Supervisor, including the harm to be redressed, the cost and feasibility of the remedy, the audience likely to be reached, and available alternatives. As discussed in my February Appeal Decision, disqualifying members of the Hoffa slate from the election would be disproportionate to the harm caused. And neither mandatory participation in a

candidate forum to debate electoral issues, nor the compensated distribution of Gegare campaign literature, would address the harm caused by the misconduct here. Those so-called remedies would in effect do nothing but provide Gegare with campaign opportunities, and the conduct here did not deprive him of such opportunities

In addition, neither Halstead nor Gegare has shown that the disclosures selected by the Election Supervisor are unreasonable. The Election Supervisor has determined that the IBT electorate can be adequately informed of the issues in this case by means of *Teamster* magazine and the distribution of notices on campaign literature tables. Halstead attacks these remedies by complaining that local union officials might sabotage notices intended for campaign literature tables, but the adequacy of the remedy cannot hinge on the assumption that IBT members will violate the Rules. Throwing away the notices would, itself, be a breach of the Rules and the Election Supervisor can address such violations if necessary.

In sum, Appellants have not demonstrated any basis to alter the form of the remedies chosen by the Election Supervisor. The Election Supervisor's "discretion in fashioning an appropriate remedy is broad and is entitled to deference." *In re: Jimi Richards*, 00 Elec. App. 1 (Aug. 14, 2000). In this case, the issuance of a cease and desist order and dissemination of a remedial notice fall within the reasonable exercise of the Election Supervisor's discretion. Those aspects of the Remedial Order are therefore affirmed.

III. Conclusion

The Remedial Order is REVERSED in part to reflect the modifications to the cease and desist order and remedial notice described above. The Remedial Order is AFFIRMED in all other respects.

SO ORDERED:

s/Kenneth Conboy
Kenneth Conboy
Election Appeals Master

Dated: April 1, 2011

CC: Distribution List
Andrew Shilling, Assistant United States Attorney
Brian Feldman, Assistant United States Attorney