

ELECTION APPEALS MASTER

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IN RE: FRANK HALSTEAD,

Protestor,

2015-2016 EAM 16 (KAR)
DECISION RE 2016 ESD 166

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Protest Decision 2016 ESD 166 (ESD 166), which addresses two protests by Frank Halstead, was issued on April 8, 2016 (OES Case Nos. P-141-020416-FW and P-175-021716-FW).

The protest in Case No. P-142-031416-FW alleged that Mr. Halstead and other campaigners were improperly limited by Gate Gourmet from campaigning in a parking lot where members park their vehicles. The protest in Case No. P-175-021716-FW alleged that Mr. Halstead and other campaigners were improperly barred by First Student and then the police from campaigning in a parking lot where members park their vehicles and, further, that First Student made an impermissible employer contribution to the slate opposed by Mr. Halstead. The Election Supervisor confirmed Mr. Halstead's allegations and found that these violations interfered with the campaign activity, or improperly allowed campaign activity, aimed at large identifiable groups of Local Union 572 members, and so "may have affected the outcome" of the election. The Election Supervisor granted the protests and ordered a prompt rerun of the mail ballot election for delegate and alternate delegate from Local Union 572. This Decision assumes familiarity with the facts set forth in detail in ESD 166.

Appeal by Local Union 572

Local Union 572 filed an appeal on April 11, 2016 (Appeal). A telephonic hearing on Local Union 572's request for a stay of the Election Supervisor's decision and remedial order was held on April 12. This hearing was attended by Jeffrey Ellison, Esq., Michael Miller, and Margaret Sheridan (Office of the Election Supervisor); Elizabeth Rosenfeld, Esq., Joseph J. Kaplon, Esq., Lourdes M. Garcia, Esq., David Hoffa, Esq., Brad Raymond, Esq., Christy Bailey, Julian Gonzalez, Esq., and Barbara Harvey, Esq. The Election Appeals Master granted the request for a stay on April 13. A further telephonic hearing on Local Union 572's appeal was held on April 15, 2016. This hearing was attended by Jeffrey Ellison, Esq., Michael Miller, Chris Mrak and Deborah Schaaf (Office of the Election Supervisor); Elizabeth Rosenfeld, Esq., Joseph J. Kaplon, Esq., Lourdes M. Garcia, Esq., David Hoffa, Esq., Brad Raymond, Esq., Christy Bailey, Julian Gonzalez, Esq., and Barbara Harvey, Esq.

On appeal, Local Union 572 disputes several of the Election Supervisor's findings of fact. With respect to Gate Gourmet, Local Union 572 contends that the Halstead campaign was rightly denied access to the "restricted" lot because it was an area controlled by the Transportation Security Administration; that Ms. Jones (who was not interviewed by OES) told Ms. Garcia that business agent Villanueva never told Gate Gourmet to deny access to Mr. Halstead and his supporters; and that Mr. Middleton never had access to or campaigned in the restricted area. With respect to First Student – San Fernando, Local Union 572 asserts that OES "ignored substantial evidence that Halstead was using the protest procedure to gain unlawful access to employer property," that there is "no evidence" to support the Election Supervisor's finding that First Student "harassed" Mr. Halstead and his supporters on February 17 and 18. Local Union 572 also complains that the Election Supervisor ignored evidence that campaign materials belonging to Mr. Halstead's slate were also posted at First Student.

The primary focus of this appeal, however, is Local Union 572's contention that the Election Supervisor improperly deferred a ruling on Mr. Halstead's pre-election protests until after the election (assertedly without notice to Local Union 572) and that "inexcusable delay" by the Election Supervisor does not justify the "draconian" remedy of a rerun election and the accompanying notice requirements. Appeal at 3. Specifically, Local Union 572 argues that "the severity of the remedy has nothing to do with Union's actions; it is solely and exclusively the consequence of the Election Supervisor's failure to act on pre-election protests that could have been easily remedied, well in advance of the election, by a posting or mailing. Local 572 should not be compelled to incur the expenses of a second election and numerous postings and mailings because the Election Supervisor was unable—or unwilling—to render a decision of pre-election protests within the seven-day period required by Article XIII §2(f) of the *Rules*." Appeal at 2.

Decision of the Election Appeals Master

This appeal challenges the facts found by the Election Supervisor, the consideration of the protests in a post-election context, and the remedies imposed.

Findings of Fact

It is well-established that the standard of review of the Election Supervisor's factual findings, including his credibility determinations, is abuse of discretion. *See, e.g., Taylor & Fabiano*, 2011 EAM 34 (April 13, 2011); *Eligibility of Swain*, 2011 EAM 20 (February 22, 2011); *Hailstone & Martinez*, 2010 EAM 7 (September 14, 2010). Courts have held that a tribunal abuses its discretion when the facts found are "clearly erroneous." *Arista Records, LLC v. Doe*, 604 F.3d 110, 117 (2d Cir. 2010).

I find no abuse of discretion with respect to the findings of fact or credibility determinations made by the Election Supervisor in this case. The material facts were largely undisputed and the Election Supervisor resolved the relatively few disputed issues based upon the weight of the evidence and reasonable assessments of the credibility of the witnesses.

Deferral of Protest Decision to Post-Election

Article XIII, Section 2 of the *Rules* (Pre-election Protests) provides in pertinent part:

(f) The Election Supervisor or an Election Supervisor representative shall evaluate the protest and shall:

(1) determine the merits of the protest and, if found meritorious, determine the appropriate remedy; or

(2) defer making a determination until after the election and thereby treat the matter as a post-election protest pursuant to Section 3 of this Article, as if such protest was filed on election day;

The Election Supervisor or a representative of the Election Supervisor shall determine the protest within seven (7) days of receipt, except that, for a protest filed pursuant to Section 2(a) above, the Election Supervisor shall determine the protest within twenty-one (21) days of docketing.

(g) The Election Supervisor shall have the authority to obtain, or to have the International Union obtain and provide, information necessary to assist in resolving any protest. The Union (including subordinate entities) and all members, candidates, slates and independent committees are required to cooperate with the Election Supervisor. Failure to cooperate with the Election Supervisor or Election Appeals Master (including making false statements to the Election Supervisor or Election Appeals Master) may result in referral of the matter to the Government for appropriate action under law (including the Final Order), or such other remedy as the Election Supervisor or the Election Appeals Master deems appropriate.

Local Union 572 argues on appeal that the Election Supervisor abused his discretion by deferring his determination of the protests relating to Gate Gourmet and First Student – San Fernando until after the election. Local Union 572 contends that the violations found by the Election Supervisor could and should have been remedied promptly after they were reported. Local Union 572 further points out that the investigator reported the violation at Gate Gourmet “resolved” by the restoration of parking lot access.

I find that the Election Supervisor acted reasonably in deferring his determination until after the election. Although parking lot access was restored several days after ballots were mailed, the Halstead Slate had been totally prevented from campaigning in the “restricted” lot for over a month, and prevented from campaigning in the general lot for two full weeks at a critical point in the election cycle. Moreover, the Election Supervisor was unable to complete his investigation into the alleged role of the business agent in the employer’s decision to limit/exclude the Halstead slate due to the admitted unresponsiveness of the business agent. This was a significant factor in determining the seriousness of the violation and an appropriate remedy. Moreover, given the difficulties encountered in contacting the employer and the business agent, it is questionable whether the alternative pre-election remedies suggested by

Local Union 572 could have been implemented soon enough to effectively counter the taint of the violations. Finally, nothing in the *Rules* requires the Election Supervisor to notify a respondent of the decision to defer determination of a protest; in any event, in this case Local Union 572 had reason to know that the investigation was ongoing due to the absence of a protest decision within 7 days, but made no inquiry until well into the voting period. For all of these reasons, I find that the Election Supervisor did not abuse his discretion in deferring his determination of the protests.

Remedy

Article XIII, Section 3 (Post-election Protests), provides in pertinent part:

(b) Post-election protests shall only be considered and remedied if the alleged violation may have affected the outcome of the election * * *.

Based upon his finding that the violations of the Rules at Gate Gourmet and First Student may have affected the outcome of the election, the Election Supervisor ordered Local Union 572 to rerun its delegate and alternate delegate election, and to distribute remedial notices. The Election Supervisor also issued cease and desist orders to Gate Gourmet, First Standard, Local Union 572, and its business agents Jaime Villanueva and Lonnie Holmes that are not challenged on this appeal.

The remedy selected by the Election Supervisor will not be disturbed except where there has been an abuse of discretion. *Gegare*, 10 EAM 1 (June 14, 2010); *Hailstone & Martinez*, *supra*; *Wharam*, 11 EAM 54 (July 18, 2011); *Reilly*, 11 EAM 62 (December 22, 2011).

Local Union 572's election plan provided for the election of twelve delegates and seven alternate delegates to the IBT convention. The January 10, 2016 nominations meeting resulted in a contested election between two full slates and no unaffiliated candidates. As provided in the election plan, ballots were mailed on February 12. Mr. Halstead led the Teamsters United 572 slate; local union principal officer Rick Middleton led the Members With Rick Middleton slate. The election count date was March 9, and 2,011 ballots returned by eligible members were counted. All candidates on the Middleton slate received more votes than any candidate on the Halstead slate. The margin between the winning delegate candidate with the fewest votes and the losing delegate candidate with the most votes was 28; the corresponding margin in the alternate delegate election was 29.

The Election Supervisor acknowledged that a violation of the *Rules* alone is not grounds for setting aside an election with a narrow margin of victory (in this case, 28 votes or 1.4%) unless there is a reasonable probability that the election outcome may have been affected by the violation. Here, however, the Election Supervisor found multiple violations that affected large numbers of members eligible to vote.

The Election Supervisor found that Gate Gourmet is one of the largest employers under the Local Union 572's jurisdiction, and that access to its membership to establish name recognition and arguments for participation and support is critical to electoral success.

At Gate Gourmet, campaigners were barred from campaigning in the restricted lot for the full duration of the period prior to the date ballots were mailed, first through employer misrepresentation that Teamster members did not park in that lot and subsequently by barring the campaigners from all areas of the employer's facility. Going back to the underpinnings of the parking lot rule, as explained by Judge Edelstein, Gate Gourmet's actions left "members ill-informed regarding the choice of candidates" in Local Union 572's delegates and alternate delegates election by narrowly limiting and then barring altogether the Halstead campaigners access to them. Such conduct "endanger[ed] the free flow of information between candidates for IBT office and the rank-and-file electorate," depriving candidates and members of the opportunity to discuss issues of importance to the membership, and candidates of the opportunity to persuade the members to participate in the election and to vote for them. * * * That a local union business agent encouraged the removal of the campaigners from the property during a critical pre-election period compounds the violation.

Given the very narrow margin separating winning from losing candidates in this election, the conduct of Gate Gourmet managers as abetted by the local union business agent is sufficient to have affected the outcome of the election. Campaigners diligently sought – and when it was permitted to them, exercised – face-to-face contact with hundreds of Local Union 572 members at that location, but were restricted in their access. We cannot measure with precision the number of contacts that were precluded by the limitations on time and location of campaigning. But, even assuming only thirty voters of the more than 1,000 members at Gate Gourmet would have voted based on direct campaign contact with the Halstead slate, that number would be sufficient to affect the outcome of this close election.

The Election Supervisor found that the violations at First Student – San Fernando added significant weight to the determination that misconduct may have affected the Local 572 election results.

First, ejecting campaigners from a parking lot where they had the right under the *Rules* to campaign barred candidates from communicating with members for the period of the ban. Moreover, doing so in a loud and public manner complete with law enforcement involvement as was done at First Student – San Fernando signals very clearly the employer's preference in the election, a signal reinforced by the employer's one-sided display of campaign literature for the opposing slate on the employer's bulletin board and one-sided distribution of that slate's material at the dispatch counter. The number of members employed at First Student – more than 140 – is significantly less than at Gate Gourmet, but easily large enough that one-sided campaigning to that population may have affected the outcome of this close election.

The display of Middleton slate campaign literature on the union's locked, glass-enclosed bulletin board at First Student conveyed a clear message of official endorsement to members employed there. Thus, bulletin board postings communicated that both the employer and the union supported the Middleton slate. There is no place for such conduct in an election under the *Rules*, and we conclude that these violations may have affected the outcome of the election.

I find that the facts in this case and the above analysis by the Election Supervisor fully support the remedy of a rerun election and other remedial measures ordered by the Election Supervisor.

Conclusion

For reasons set forth above, the appeal of ESD 166 is DENIED, and ESD 166 is AFFIRMED in all respects.

Local Union 572 and the Election Supervisor are directed to attempt to agree no later than noon (EDT) on April 25, 2016, on a revised schedule for implementation of the remedial measures ordered by the Election Supervisor. If no agreement has been reached, a telephonic hearing will be held at 4:00 PM (EDT) on that date. To attend the hearing, dial 877-696-5267 and enter the code 3136941, followed by the # sign.

SO ORDERED.

/s/ _____
KATHLEEN A. ROBERTS
ELECTION APPEALS MASTER

April 21, 2016