

May 6, 1998

VIA UPS OVERNIGHT & MESSENGER

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**Re: Election Office Case Nos. PR-061-RCS-EOH
PR-070-RCS-EOH**

Gentlepersons:

James P. Hoffa and the Hoffa Slate filed pre-election protests pursuant to Article XIV, Section 2(b) of the *Rules for the 1995-1996 IBT International Union Delegate and Officer Election* ("**Rules**") alleging violations by the Ron Carey Slate. The protesters allege violations in the reporting and treatment by the Carey Slate of their debt from the initial election. Specifically, the protesters allege the following violations by the Carey Slate: 1) that it was sufficiently delinquent in filing the debt Campaign Contribution and Expenditure Report ("CCER") that a fine for delinquency should be levied by the Election Officer; 2) that it improperly reported \$68,165 in non-itemized contributions on the debt CCER, therefore the Election Officer will investigate those contributions to ensure they do not violate the **Rules**; 3) that it failed to provide the required documentation for a raffle reported in the debt CCER; and 4) that it failed to repay its debt from the initial campaign, therefore the debts are now improper campaign contributions. These allegations are addressed separately below.

The protests were investigated by Election Office Director of Campaign Finance Leslie Deak.

I. Delinquency in the Filing of the Carey Slate Debt CCER

The protesters allege that the Carey Slate was delinquent in filing its debt CCER. The Carey Slate requested and received an extension from the Election Officer allowing them to file

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the CCER on February 23, 1998. The Carey Slate filed its debt CCER on February 27, 1998, four days after the extended due date. The Carey Slate neither requested an additional extension nor notified the Election Officer of the further delay.

To emphasize the importance of prompt filings to the oversight process, the Election Officer has issued decisions in the rerun election fining candidates for delinquent filings of their CCERs. See Letter from Election Officer Cherkasky to Diana Kilmury imposing fine of \$300 dated December 22, 1997, aff'd, 98 - Elec. App. - 336 (KC) (January 15, 1998); Letter from Election Officer Cherkasky to Thomas N. Keegel imposing a fine of \$300, dated February 19, 1998. In Kilmury, Ms. Kilmury filed her reports 36 days late without requesting an extension from the Election Officer. In Keegel, Mr. Keegel was granted a one-week extension to file his CCER. Without notice to the Election Officer, he subsequently filed his CCER two weeks after the extended deadline.

The Carey Slate filed four days late without any notification to the Election Officer or any further request for an extension. The Election Officer wants all those filing CCERs to view the filing deadlines seriously and will not tolerate delinquent filings (unless the candidate or slate filing the CCER has requested an extension in writing, and the Election Officer has granted the extension).

Accordingly, this portion of the protest is hereby GRANTED. Since the delinquency in this situation was less than a week, the Carey Slate is ordered to cease and desist from further delinquent filings and further ordered to pay a fine of \$100 within three (3) days of receipt of this decision. The payment shall be made to the Officer of the Election Officer and will be utilized to help defray the costs of the rerun election.

II. Improprieties in the Non-Itemized Contributions Reported on the Carey Slate's Debt CCER

The protester alleges that the Carey Slate's debt CCER lists a total of \$68,165 in un-itemized contributions. The protester requests that, given the high percentage of non-itemized contributions, these contributions should be thoroughly investigated by the Election Officer.

Under the **Rules** governing the initial election, and thus the debt CCER, slates, and candidates did not have to itemize contributions under \$100 on their CCERs.

Based on the **Rules** for the initial election, the Carey Slate Campaign properly listed contributions under \$100 as unitemized contributions. During the investigation of this protest, the Carey Slate submitted documentation identifying the source of the un-itemized contributions reported in the debt CCER. The documentation showed that none of the contributions came from a prohibited source.

The protesters infer impropriety from the high percentage of un-itemized contributions, citing Cheatem, Post-27-EOH (August 21, 1997), aff'd in rel. part, 97 - Elec. App. - 322 (KC) (October 10, 1997) where the Election Officer found the Carey Slate to have engaged in

improper fundraising activity in the initial election. The Election Officer notes, however, that this is not the standard for such an investigation. In In re Carey Slate, 97 - Elec. App. - 322 (KC) (November 17, 1997), the Election Appeals Master directed the Election Officer to investigate the nature and the source of certain unitemized contributions. That decision does not create any presumption or conclusion that the mere existence of unitemized contributions in connection with the initial election violates the **Rules**. An allegation that improper contributions requires an investigation tailored to resolve the issue presented specifically by that allegation. Here, the Election Officer has reviewed the documents itemizing the source of these contributions and has found no evidence of funds coming from an unlawful source. The protesters have rested on their allegation, and have not provided any evidence of an improper contribution.

Accordingly, this portion of the protest is hereby DENIED.

III. Failure to Properly Document a Raffle Reported on the Debt CCER

The protesters allege that the Carey Slate violated the **Rules** by failing to fully document a raffle held in October 1997 to raise funds to retire campaign debts. Under the reporting requirements for the initial election, slates and candidates were not required to submit documentation on raffles or fundraisers with their CCER. Therefore, the Carey Slate has properly reported the October 1997 raffle on their debt CCER.

Accordingly, this portion of this protest is hereby DENIED.

IV. Failure of the Carey Slate to Repay Outstanding Debts

The protesters allege that the Carey Slate failed to repay its outstanding debts from the initial election. They argue that the Carey Slate failed to adhere to negotiated payment schedules with its creditors, thereby turning the outstanding debts into improper employer contributions because the creditors are employers.

The investigation revealed the following. On July 1, 1997, the beginning of the debt CCER reporting period, the Carey Slate had debt obligations in a totaling \$357,830.68, owed in varying amounts to 16 creditors. They paid a total of \$163,213.53, as of December 31, 1997, the end of the reporting period. Adding in additional debt they incurred during the period, the debt CCER indicates a total debt of \$218,594.17.

Under the **Rules**,

If a candidate or candidate's campaign incurs a debt by loan, extension of credit, deferred payment terms, contingency fee arrangement or the like and fails to pay the debt, the debt shall be deemed a contribution made by the creditor to the candidate or the candidate's campaign, unless the creditor has made a commercially reasonable attempt to collect the debt.

Rules, Article XII, Section 1(b)(7). In reviewing protests under this section of the **Rules**, the Election Officer looks first at whether there has been a failure to pay the debt, and if he finds such a failure, he reviews whether the creditors have made commercially reasonable attempts to collect the debt. A commercially reasonable attempt to collect a debt is viewed in the context of each creditor and the creditor's industry. The Election Officer will consider as evidence of attempts to collect the debt actions such as referral of the debt to a collection agency, institution of formal collection procedures, settlement of the debt by negotiated agreement, or a decision to cease collection based upon the costs of collection. Overall, the Election Officer will consider whether the creditor treats other similarly situated debtors in a similar manner.

During the reporting period, the Carey Slate paid some money on all of its debts and paid in full several of the larger debts. According to the debt CCER, regular payments were made through October 1997 with payments slowing in November and December. Further investigation revealed that few payments were made on the debt after December 1997.

At the beginning of the reporting period, the Carey Slate had debt obligations to 16 creditors. It paid its debt in full to three creditors: Local 1199 Communications Center, MCI and United Parcel Service. Of the remaining creditors, it owes approximately \$2,000 or less to seven creditors: Access Editique, Dunn & Bradstreet/ Pennsylvania Convention Center, Joe Fahey, Teamsters Local Union 115, Bob Muehlenkamp, Tele-Print, and the Tyson Group. After the initial campaign, the Carey Slate had six creditors with whom they had major debt obligations of more than \$5,000, including AFSCME and Delancy Printing Company, to whom they owed over \$70,000 each. Therefore, it appears that the Carey Slate has been paying down its debt although payments have slowed significantly.

The Election Office also investigated the creditors' treatment of the Carey Slate's debt by contacting major creditors of the Carey Slate. The creditors uniformly stated that they were treating the Carey Slate debt as they treat all other delinquent accounts; however, the specific actions taken by the creditors varied depending on the size of the debt, the industry, and the size of the creditor. One creditor stated that the debt was too small to commence legal action against the Carey Slate and they had no practice of suing debtor clients. At least one creditor, which is owed a far larger amount, was considering legal action. That creditor indicated that the decision to take legal action to collect the debt depends solely on economic cost-benefit analysis, not on any favoritism to the Carey Slate campaign. None of the evidence suggests that creditors are taking or refraining from taking action in order to assist the Carey campaign.

The Carey Slate submitted documentation demonstrating the actions of creditors in collecting the debts. The documentation supported the verbal statements of the major creditors. Several of the creditors assigned the delinquent accounts to collection agencies. Others regularly sent letters demanding payment.

The debts of the Carey Slate are not contributions because they have made repayment on their debt. Numerous payments were made during the reporting period and several significant obligations were paid off. The remaining debts have been significantly reduced.

The protesters argue that because the Carey Slate has failed to abide by repayment schedules between the Carey Slate and its creditors, the Election Officer must find that the debts converted to contributions. This is incorrect. The **Rules** do not mandate debt repayment in any certain manner or in accordance with any certain payment plan; nor did the Election Officer order that the Carey Slate repay its debt according to a certain schedule.¹ Indeed, as stated above, the Election Officer looks to the totality of the circumstances. Thus, the failure to adhere to a repayment schedule would be a factor in reviewing whether a candidate or slate has failed to repay its debts.

Moreover, the creditors are making commercially reasonable attempts to collect the remaining debt. They have followed appropriate courses of action, sending demand letters, and, in some cases referring the matter to collection agencies. The remaining creditors are making decisions regarding collection depending on the depth of their resources and the size of the debt owed to them. There is no evidence that the creditors are giving the Carey Slate more favorable collection terms than other debtors. While some of the creditors may negotiate with the Carey Slate in the future to reach closure on the debt, depending on the circumstances, such action would be examined for its commercial reasonableness.² The Election Officer will continue to monitor the debt situation for the Carey Slate and others who carry debt from the initial election.

¹In Hoffa, Post-45-EOH (August 21, 1997), the Election Officer found the agreements for the Carey Slate's repayment of its debts to AFSCME and Local 1199 Communication Centers commercially reasonable. The Election Officer did not find that those agreements would be the only commercially reasonable arrangements the Carey Slate could possibly use in repayment. Nor did the Election Officer find that if the Carey Slate fails to adhere to that agreement, it would violate the **Rules**.

²The Carey Slate has not reached agreements with their creditors to accept the amount they paid for payment in full, as the Hoffa Slate Campaign did with many of its creditors.

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The Election Officer recognizes that, although not explicitly addressed by the instant protest, it is appropriate at this time to address the relationship of the remaining Carey Slate debt to the candidates who were part of that slate in the initial election, but may seek to run on another slate or as an independent candidate in the rerun election. In a recent decision, the United States Court of Appeals for the Southern District of New York, approved a change in the Rerun Plan which permits candidates to reassess their slate affiliations. The Court stated:

[C]onsidering the significant change in circumstances since this Court's Rerun Plan Decision, it is sensible that candidates be afforded an opportunity to reassess their slate affiliations. Therefore, this Court finds it appropriate to amend the Rerun Plan so as to permit any candidate, whether previously or newly nominated, to file a slate declaration and appear on the ballot for any International Officer position as a member of any full or partial slate to be formed, provided that slate declarations are filed by the deadline to be provided in the timetable for the Rerun Election.

United States v. IBT, 88 Civ. 4486 (DNE) (Mar. 24, 1998), slip op. at 5-6. The debt herein was reported on the Carey Slate CCER, not on the CCER of any individual candidate on that slate. The Committee to Elect Ron Carey '96 had a bank account in its own name, obtained goods and services under that name, and paid creditors with checks drawn on that account. Under the **Rules**, it is the Carey Slate that must resolve, and report on, this debt. To the extent that any of the former Carey Slate candidates qualified to run in the rerun election join a newly constituted slate, or run as individual candidates, that candidate will not be obligated to report on and resolve the Carey Slate debt.³ Individual candidates are obligated to report on and resolve any debts arising from their own campaigns in the initial election. If the Carey Slate intends to remain as a slate in the rerun election, it cannot incur any further debt without first resolving the debts from the initial election.⁴

Accordingly, this portion of the protest is DENIED.

³By this determination, the Election Officer is not determining what legal rights, if any, that creditors of the Carey Slate may have against individual candidates who ran on the Carey Slate.

⁴The debts incurred by candidates and slates in the rerun election will be closely monitored. The Election Officer will review whether the payment terms are commercially reasonable and whether the debt is being repaid by the candidate or slate. As the Election Officer stated in James P. Hoffa Slate, Post-45-EOH (August 21, 1997), "Even an initially valid transaction can become a contribution if the creditor fails to collect the amount due in a commercially reasonable manner."

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Any interested party not satisfied with this determination may request a hearing before the Election Appeals Master within one (1) day of receipt of this letter. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Officer in any such appeal. Requests for a hearing shall be made in writing and shall be served on:

Kenneth Conboy, Esq.
Latham & Watkins
885 Third Avenue, Suite 1000
New York, NY 10022
Fax: (212) 751-4864

Copies of the request for hearing must be served on the parties listed above as well as upon the Election Officer, 444 North Capitol Street, NW, Suite 445, Washington, DC 20001, Facsimile (202) 624-3525. A copy of the protest must accompany the request for a hearing.

Sincerely,

Michael G. Cherkasky
Election Officer

MGC:chh

cc: Kenneth Conboy, Election Appeals Master