ELECTION APPEALS MASTER

IN RE:

DAN VIRTUE AND CARLOS RAMOS,

Protestors.

07 Elec. App. 082 (KC)

ORDER

This matter is an appeal from the Election Supervisor's decision 2007 ESD 403, OES Case Nos. P-07-370-013007-HQ and P-07-371-013007-HQ issued July 9, 2007.

A hearing was held before me on July 18, 2007. The following persons were heard by way of teleconference: Richard W. Mark, Esq., the Election Supervisor; Jeffrey Ellison, Esq., Steven R. Newmark, Esq. and Alexandra Brandon, summer associate for the Office of the Election Supervisor; David Hoffa on behalf of the Hoffa Campaign; Bradley T. Raymond, Esq., General Counsel of the International Brotherhood of Teamsters; Barbara Harvey on behalf of Teamsters for a Democratic Union; Ira Weinstock, Esq. on behalf of Daniel Virtue, Carlos Ramos, Kevin Cicak and Mark Andreozzi; Kevin Cicak, Mark Andreozzi, Daniel Virtue and Carlos Ramos, members of Local Union 776; Daniel Virtue and Carlos Ramos are the protesters.

In the 2005 – 2006 IBT International election, Virtue ran as an independent candidate for the Office of International Vice President for the Eastern region. Ramos actively supported his campaign. Virtue was defeated by Hoffa Slate candidates. Following certification of the results, which returned to office IBT General President James P. Hoffa, the General President fired Virtue and Ramos from their positions as appointed International representatives. Virtue and Ramos here complain that their firings constitute retaliation under Article XIII, § 3 of the Rules for the 2005 – 2006 IBT International Union Delegate and Officer Election ("Rules"), because they exercised their Rules protected rights to campaign for election as insurgents against the incumbent leadership of the IBT.

The Election Supervisor denied their protests, apparently concluding that the IBT Constitution, at least in a post-certification setting, trumps the Rules, and governance powers flowing

from the Hoffa Slate's electoral mandate validate the conventional political axiom "to the victor belong the spoils." It is noted that the Election Supervisor did not, in his decision of record, his written appeals statement or in his oral argument during the hearing, explicitly state whether his reading of Article XIII, Section 3, which is of course an expression of the intent of the parties (the United States Government and the IBT) that negotiated the Rules and the United States District Court for the Southern District of New York that approved them, supports a conclusion that the drafters never intended to cover post certification firings of defeated political insurgents. Nor did the Election Supervisor explain how these firings, under Consent Decree precedent, though plainly retaliatory and actionable before the ballots are counted, are transformed by the IBT constitution to a place outside the Consent Decree and the plain language of the Rules in the aftermath of ballot counting. His rationale appears to rest on an assumption that these firings of electoral opponents could not be retaliatory within the meaning of the Rules because the democratic will of the rank and file has explicitly repudiated the protesters. Bradley T. Raymond, General Counsel of the IBT, makes the trenchant point that the Rules "do not confer permanent employment status on International Representatives who run for office unsuccessfully." (Letter of Bradley T. Raymond, July 17, 2007 at 2.)

This protest appeal implicates a number of significant questions:

a) The meaning and scope of the concept of "retaliation" under the Rules and in case precedent under the Rules governing prior International election cycles, and specifically whether a species of "benign" retaliation (to the victor belongs the spoils) exists in the Rules;

b) The application and relevance of U.S. Supreme Court precedent in Finnegan v. Leu, 456 U.S. 431 (1982) and United States Court of Appeals for the Second Circuit precedent in Schonfeld v. Penza, 477 F2d 899 (2d Cir. 1973);

c) The impact of the Election Appeals Master's decision in Wsol 95 EAM 17 (October 10, 1995) with respect to its explicit language holding that the Rules ban any retaliation in response to a member's candidacy for International office, the provisions of the IBT Constitution and federal case law not withstanding;

d) The applicability of assumptions and inferences relating to the ongoing federal court supervision embodied in the Consent Decree, now in its eighteenth year, and whether its continuing viability requires the drawing of a necessary inference

> that "the culture of intimidation and coercion...remains and continues to cast a coercive pall over International Union elections (TDU submission, July 17, 2007 at 2.)

The following facts have been found by the Election Supervisor and are not in material dispute:

- Virtue and Ramos had performed their duties as International representatives within the Hoffa Administration in an entirely satisfactory manner.
- Virtue and Ramos did nothing during the course of holding appointive office to undermine, oppose or impede the policy initiatives and programs of the Hoffa administration.
- The justification given by the IBT to the Election Supervisor for terminating Virtue and Ramos was pretexual and untrue, giving rise to the permissible inference that the firings were driven by improper retaliatory motivation.

In light of this record, the Election Supervisor's analysis of the cited case law is insufficient. As noted by counsel for the TDU:

> The Election Supervisor's broadly framed decision that the Rules permit all "politically – motivated, post certification actions" authorized by the IBT constitution, 2007 ESD 403 at 7, is so broad that it would permit politically motivated removals from union positions that would be unlawful under the LMRDA. (Letter of Barbara Harvey, July 17, 2007 at 4.)

Furthermore, it is clear from the face of the decisions in Finnegan and Schonfeld that they do not support the outcome here in absence of a formal factual finding of the Election Supervisor that these firings were not a "part of a purposeful and deliberate attempt...to suppress dissent within the union," Schonfeld at 904.

The Consent Decree came into being precisely in response to such pervasive institutional hostility in the IBT to free and unfettered democratic elections.

Indeed, the Election Supervisor was invited during the Hearing to address the question of whether at this date in the protracted life of the Consent Decree, after numerous election cycles and countless election protests vetted, the IBT's culture of intimidation and coercion had dissipated. He declined to do so.

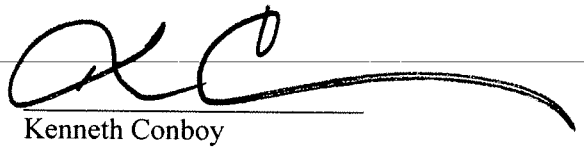
It is puzzling why the Election Supervisor did not respond to the protesters' statement at page 3 of the formal appeal:

> To allow this blatant retaliation to stand will no doubt have a chilling effect on democracy within our Union. Potential future opposition candidates will have to look no further than how the Election Appeals Master handles this case in order to know whether or not they are truly free to exercise their right to run for office or nominate candidates without fear of systematic retaliation by an incumbent administration.

Under these circumstances a formal submission by the United States Attorney for the Southern District of New York is essential to the resolution of this matter, and to the broader values and objectives embodied in the Consent Decree.

Accordingly, the Government is invited to submit a brief on the case within fifteen (15) days of the date of this Order.

SO ORDERED:



Kenneth Conboy
Election Appeals Master

Dated: July 27, 2007

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