

**OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

IN RE: JERRY HALBERG,)	Protest Decision 2007 ESD 402
)	Issued: May 2, 2007
Protestor.)	OES Case No. P-07-372-031407-HQ
_____)	

Jerry Halberg, a member of Local Union 174 and former full-time organizer employed in the IBT organizing department, filed a post-election protest pursuant to Article XIII, Section 3 of the Rules for the 2005-2006 IBT International Union Delegate and Officer Election (“Rules”). The protest alleged that Halberg was coerced to take paid vacation from his IBT employment in order to campaign for the Hoffa slate. The protest seeks reimbursement for the paid vacation Halberg contends he was required to use.

The protest further alleged that Halberg was told he and others would lose their IBT jobs unless the Hoffa slate won the election. Now that Halberg has lost his IBT employment despite his effort and financial contributions to the Hoffa slate’s victory, he seeks a refund of the \$2,000 contribution he made to the Hoffa slate.

Election Supervisor representative Jeffrey Ellison investigated this protest.

Findings of Fact

During the period relevant to this protest, Halberg was employed as a full-time organizer in the IBT organizing department. He was assigned to organizing campaigns in the western United States and reported directly to Manny Valenzuela. Jeff Farmer was the IBT’s director of organizing.

On September 12, 2006, the Hoffa campaign sent a letter on its letterhead and signed by Farmer to the organizing staff, some 40 full-time employees, urging their support for the Hoffa slate. The letter stated the following, in relevant part:

Dear Organizer:

I am writing today to ask you to lend your time and skills to re-electing the Hoffa 2006 slate. I know that you share the vision of a strong, united Teamsters Union and understand that we must re-elect the Hoffa 2006 slate to continue the hard work of organizing the unorganized.

Our work is cut out for us. We have less than a month before ballots are mailed to every Teamster member. We must make sure that our brother and sister Teamsters know what is at stake in this election and that they take the time to vote.

I have committed to do my part for the re-election efforts. I need your help more than ever before. Here is what you can do.

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1. Request vacation time for the weeks of October 6th and October 13th. Ballots will mail on October 6th so this is the critical time to turn out our vote.
2. Talk to your Local Union about scheduling times to visit worksites and participate in phone banking.

I know we can count on your support. Thank you for all of your efforts.

Fraternally,

Jeff Farmer

The one-page letter included a notice at the foot of the page stating in part that “[i]t is important to remember that you CAN NOT use IBT resources to campaign.”

Halberg received the Farmer letter at his home address. Although Halberg supported the Hoffa slate, he did nothing in response to Farmer’s letter. Some 10 months earlier, Halberg contributed the maximum amount permitted by the *Rules* to the Hoffa-Hobart campaign. Thus, Hoffa-Hobart CCER filings show that Halberg made a monetary contribution of \$1,900 to the campaign on November 2, 2005. The same date, he purchased \$100 of campaign paraphernalia, a sum that was credited to his \$2,000 contribution limit. Subsequently, on August 7, 2006, Halberg made a contribution of \$250 to the Hoffa-Hobart legal and accounting fund.

As a full-time IBT organizer, Halberg’s typical schedule consisted of a field assignment for 10 consecutive days followed by 4 consecutive days off. The schedule varied as necessary. Thus, in the critical final weeks before a vote for representation, Halberg and other full-time organizers typically logged more than 10 consecutive days of field duty, sometimes exceeding 20 consecutive work days. Following completion of the campaign, the organizers performing extended service were usually granted a correspondingly extended leave period.

Halberg’s schedule for September and October 2006 bears out the variations in his assignments. September 1 through 4 were recorded as days off. September 5 through 15 (11 consecutive days) were spent on an organizing campaign in Selma, California. Halberg was scheduled off September 16 through 19, and took September 20 and 21 as pre-scheduled sick days to attend medical appointments. Halberg’s travel reservations show that his next assignment was to work 21 consecutive days on a campaign at Taylor Farms in Salinas, California, September 22 through October 12. Taylor Farms was under contract with the IBT, but a member had filed an NLRB petition seeking to invalidate the union security provision of the collective bargaining agreement. The vote on that petition was scheduled to occur October 11, 2006.

Halberg arrived in Salinas on September 22. The tasks of the organizers working that campaign included house-to-house visits of bargaining unit members in order to stress the importance of retaining the union security clause. Halberg’s task was to organize efficient routes for this door-to-door canvassing. He did so by entering members’ home addresses into mapping software to create maps by which canvassers could visit members’ homes.

As organizers met with members at their residences, they assessed the relative strength of each member's support for or opposition to the ballot question. Those members who were strongly for or strongly against the proposition were not scheduled for a repeat visit. However, members who were leaning for or against the proposition or who were undecided were scheduled for another visit. Halberg's daily tasks included cataloguing the data each canvasser accumulated and scheduling members for repeat visits as warranted.

As indicated, the NLRB election was scheduled for October 11, 2006. On or about September 26, Halberg stated that he received a telephone call on the union phone from Valenzuela, his supervisor, who "told me that I had not submitted a request for two weeks of vacation for campaigning and that I was to immediately submit a vacation request to the IBT organizing department and cancel the remainder of my rotation on the Taylor Farms campaign. He instructed me to then go home and get my election campaign assignment for the two-week period. In this conversation he also related that the election was very important because if Hoffa did not win 'None of us would have a job.'"

Halberg told our investigator that he did not question Valenzuela or object to what Valenzuela told him but rather took the communication as a directive he was obliged to follow. When Halberg hung up the telephone, he told Charlie Stevenson, the lead organizer on the Taylor Farms campaign, that Valenzuela had just instructed him to end the rotation and go home to campaign for the Hoffa slate. According to Halberg, Stevenson replied, "Then that's what you should do."

Valenzuela denied making the telephone call to Halberg or otherwise directing that he or any other subordinate take vacation time to campaign for the Hoffa slate. Further, Valenzuela denied even discussing with Halberg or anyone else the need or desire that they take vacation time to campaign for the Hoffa slate.

Contradicting Valenzuela, Ed Rodriguez, another full-time IBT organizer supervised by Valenzuela, told our investigator that, in mid-September 2006, Valenzuela telephoned him to tell him that he needed to take a "voluntary vacation" to campaign for the Hoffa slate. Rodriguez had not received the Farmer letter suggesting such action, so Valenzuela's statement had no context. Rodriguez, a long-time Teamster and organizer, told our investigator that he typically did not use the vacation time he earned, preferring to be out in the field on organizing campaigns. When Valenzuela told Rodriguez that he needed to take a voluntary vacation to campaign for the Hoffa slate, Rodriguez laughed out loud. Rodriguez told our investigator that, at this, Valenzuela "got real quiet" and said nothing more on the subject during that phone call. Several days later, Rodriguez spoke with Valenzuela again and asked him "about this vacation I'm supposed to take." Valenzuela replied that he should not worry about it: "We found someone to fill your slot." Accordingly, Rodriguez did not take vacation to campaign for the Hoffa slate.

Halberg told our investigator that, in response to Valenzuela's phone call, he prepared a vacation request and faxed it to the IBT organizing department in Washington, D.C. The same day, he followed the faxed request with a telephone call and was told by an office clerical in the department that the request had been approved. He then contacted the IBT travel department and stated that he was leaving the Taylor Farms campaign to return home because his rotation had ended. The travel department rebooked his air travel to October 1 from October 12, incurring an

airline re-booking charge of \$50 that was paid by the IBT. Although his rotation on the Taylor Farms campaign ended sooner than originally scheduled, it lasted 10 days, a normal length.

Halberg took his scheduled days off from October 2 through 5 and his vacation from October 6 through 15. During that period, he went to the Washington State union office of Al Hobart, IBT western region vice president, who gave him a campaign assignment in Oregon. Halberg stated that he spent his vacation time campaigning for the Hoffa slate.

As Halberg's supervisor, Valenzuela stated that he was aware that Halberg was taking vacation 10 days before the election in the Taylor Farms campaign. He stated that he approved of the vacation request because the data collected by the door-to-door canvassers suggested that the union would win the election by a wide margin. Further, other staff was available to fill the mapping function Halberg performed. The tally of ballots in the Taylor Farms election showed that the union won the campaign by a margin of 966 to 60.

The tally of ballots in the International officer election was completed on November 18, 2006, and all candidates on the Hoffa slate were elected. The election results were certified on January 8, 2007.

On January 10, 2007, Halberg was summoned to a meeting with Leo Deaner, executive assistant to General President Hoffa, at which Halberg was terminated from his full-time job in the IBT organizing department effective January 31. Rodriguez, Halberg's co-worker, was terminated at about the same time.

Halberg received payment for accrued vacation time on March 12, 2007. The vacation payout was, according to Halberg, short the 10 vacation days he had used in response to Valenzuela's phone call. Halberg filed this protest on March 14. He told our investigator that he was aware of the *Rules'* time limit for filing protests but consciously delayed filing out of concern of retaliation if he filed either while still employed or before he received his final vacation payout. The protest stated that "[i]t is not my intention to protest the grounds for termination."

Halberg's protest constituted his first demand for a refund of his campaign contribution from the Hoffa slate. During the investigation of the protest, the Hoffa slate, by its counsel, refused to refund the contribution.

Analysis

Both the IBT and the Hoffa slate challenge the protest as untimely filed. We address this issue before proceeding to the merits.

Under Article XIII, Section 2, pre-election protests, including "pre-election threats, coercion, intimidation, acts of violence, or retaliation for the exercise of rights protected by the *Rules*," must "be filed within two (2) working days of the day when the protestor becomes aware or reasonably should have become aware of the action protested or such protests shall be waived." Article XIII, Section 3 declares that "[p]rotests regarding any alleged improper election day or post-election conduct or event must be filed ... with fifteen (15) days of the announcement of the election results, when involving the International Officer election; or ... within two (2) working days of the date when the protestor becomes aware or reasonably should have become aware of

the action protested, when involving alleged improper post-election threats, coercion, intimidation, acts of violence or retaliation or the exercise of rights protected by the *Rules*.”

Halberg’s protest makes two claims. First, he alleges that he was coerced to use paid vacation time to campaign for the Hoffa slate, alleged actions and events that occurred in September and October 2006 and prior to the November 2006 tally of ballots in the International officer election. This aspect of Halberg’s complaint constitutes a pre-election protest and is subject to the 2 working day limitations period of Article XIII, Section 2(b). *Berg*, 2006 ESD 296 (June 4, 2006), *aff’d*, 06 EAM 44 (June 15, 2006). By any measure, this aspect of Halberg’s protest is untimely filed.

The second assertion in Halberg’s protest is that his financial contribution to the Hoffa slate constituted bargained-for consideration for retaining his IBT job if the Hoffa slate won the election and that his discharge from employment after the Hoffa slate’s victory entitled him to a refund of his contributions. As the alleged failure of the Hoffa slate to refund Halberg’s contribution occurred post-election, it is subject to the 2 working day limitations period of Article XIII, Section 3(a)(3). The alleged violation occurred as of the date the Hoffa slate failed or refused to refund Halberg’s contribution. Such refusal first occurred here during the investigation of this protest. Halberg’s protest against the Hoffa slate therefore is timely filed.

With respect to his claim against the IBT, Halberg asserts that he intentionally delayed filing the protest because he feared retaliation if he filed while an employee or, after his dismissal, while awaiting final payout of accrued benefits. Such an assertion, if well-founded, may provide a basis for waiver of the *Rules*’ time limits for filing protests. In *Gleason*, 2006 ESD 370 (November 9, 2006), *aff’d*, 06 EAM 79 (December 7, 2006), the protestor, through claimed ignorance of the *Rules*’ time limits, untimely challenged his discharge from union employment as retaliation for *Rules*-protected activity. We rejected the challenge to the timeliness of the protest as follows:

Precedent establishes that the protest time limit is a prudential restriction rather than a jurisdictional requirement. *Ruscigno*, P144 (October 4, 1995), *aff’d*, 95 EAM 25 (October 18, 2005). Accordingly, we may, in the exercise of discretion, waive the time limit if circumstances warrant that we do so.

We find that Gleason did not act with the promptness the *Rules* require to ascertain and seek to enforce his rights under the *Rules*. As an elected delegate, Gleason knew or should have known his rights and obligations under the *Rules*. For that reason, if the limitations period for filing protests were deemed to be jurisdictional, we would have no compunction in denying this protest as untimely filed, for Gleason either knew or should have known that he had to act with dispatch to protest his dismissal from his business agent position. However, this case illustrates the policy that underlies the principle, repeated in every election cycle, that the protest time limit is a prudential one. Because of the heightened scrutiny the *Rules* apply to cases of alleged retaliation and the particular circumstances of this case, we decide the matter of Gleason’s discharge on its merits.

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Similarly, in *Pimental*, 2001 EAD 251 (March 21, 2001), *aff'd in relevant part*, 01 EAM 58 (April 19, 2001), we considered on the merits an untimely protest alleging election-related intimidation. The protestor there filed untimely because of ignorance of the time limits.

The instant protest alleges election-related coercion, an allegation in the same category as the retaliation and intimidation at issue in the cases just cited. We waived the time limits in those cases because of the nature of the alleged misconduct and because the protestor was unaware of his rights under the *Rules*. Unlike the protestors in the cited cases, however, Halberg has filed or been a party to at least one protest in each of the election cycles since the Consent Order was entered and is well aware of protest procedures, including time limits applicable to them. *See, e.g., Halberg*, P403 (February 22, 1991); *Halberg*, 95 EAM 20 (October 3, 1995), *Halberg*, P19 (December 14, 1995); and *Hasegawa*, 2001 EAD 382 (June 5, 2001). He cannot and does not assert ignorance of the time limits. Rather, he asserts as excuse for the untimely filing his belief that he would suffer retaliation for doing so. For the reasons that follow, we reject this explanation and hold that Halberg unreasonably delayed filing his protest against the IBT alleging that he was coerced to use vacation time to campaign for the Hoffa slate.

The *Rules* prohibit retaliation for election-related activity. Article VII, Section 12(g). Further, the *Rules* prohibit “direct or indirect retaliation or threat of retaliation” for protest activity. Article XIII, Section 1. Notwithstanding these protections, Halberg asserts that he deferred filing his protest for more than 5 months because he feared the IBT would take adverse employment action against him if he filed earlier. Initially, he feared loss of employment if he filed. When he was terminated anyway, he believed the IBT would fail or refuse to pay him his accrued vacation time if he filed.

Such adverse action, had it occurred, would have violated the *Rules*. We take such matters seriously and have consistently imposed make-whole remedies on proof of retaliation. *See, e.g., Bundrant*, 2005 ESD 19 (October 25, 2005), *aff'd*, 05 EAM 4 (November 15, 2005); *Gleason, supra*.

Halberg presented no evidence to substantiate his belief of retaliation. It is well-established that a “palpable threat of actual harm” for election-related activity violates the *Rules*, *Ostrach*, 2000 EAD 57 (December 6, 2000), *aff'd*, 01 EAM 15 (January 9, 2001); *Echeveria*, 2006 ESD 66 (February 3, 2006), but such a threat can be found only upon evidence that supports it and not merely on the protestor’s subjective belief or conjecture. We will not infer a threat of retaliation from the statement Halberg ascribed to Valenzuela because neither the language nor the tone of Valenzuela’s alleged statement conveyed an “or else” imperative. The *Rules* do not prohibit officers or supervisors from soliciting electoral support from subordinates, where there is no evidence of coercion or undue influence. *Elias*, 2001 EAD 248 (March 20, 2001); *Zimmerman*, 2001 EAD 521 (October 23, 2001). We are unwilling to find such coercion or improper influence here, especially given the experience of Halberg’s co-worker, Rodriguez, who deflected Valenzuela’s request for a “volunteer vacation” merely by laughing out loud.

Even had Halberg possessed a well-founded fear of retaliation for filing a protest while still employed, that belief lost all foundation after he was discharged. At that point, he was simply awaiting final payout of his accrued benefits, an amount that could be objectively calculated and about which there was no dispute. Nothing in the evidentiary record establishes a substantial basis for Halberg’s apparent belief that the IBT would withhold some or all of his

accrued benefit in response to any protest Halberg might file. Nonetheless, Halberg did not file the instant protest until 2 months after notice of discharge and 6 weeks after the discharge became effective.

Finally, we reject the implication that Halberg filed his protest on March 14 in response to the vacation payout he received from the IBT on March 12, a payout that did not include the vacation time he used in October. Halberg knew or should have known when he went on vacation in October that the time would be deducted from his vacation bank. Therefore, it was no surprise to him in March that the vacation payout he received from the IBT did not include vacation time he had used and for which he already had been paid the previous year. Accordingly, the March 12, 2007 receipt of the balance of accrued vacation time did not trigger a new limitations period for the September and October 2006 events described here.

For these reasons, we find no basis for a prudential waiver of the time limits set forth in Article XIII, Section 2(b) and DENY Halberg's protest against the IBT as untimely filed.

We turn now to Halberg's timely protest against the Hoffa slate, in which he alleged that the slate improperly failed or refused to refund his campaign contribution. This aspect of the protest sounds in contract. Halberg contends that he made the maximum contribution in consideration for a promise of continued employment in the event the Hoffa slate won the election. Such a promise of benefit in exchange for campaign support, if made, would violate the *Rules*.

We find that the bargained-for exchange Halberg alleges did not occur. Halberg bases his claim on Valenzuela's alleged statement that, if Hoffa was not re-elected, "none of us would have a job." Leaving aside the lack of proof of an agency relationship between Valenzuela and the Hoffa slate, such a statement, if made, does not prove the *quid pro quo* Halberg alleges that he would retain his job if Hoffa were elected. Instead, it signaled the likelihood that if the challenging slate were elected, its members would appoint different individuals to fill the positions in the organizing department. Moreover, Halberg did not make any financial contributions in response to Valenzuela's alleged statement because he had contributed the maximum permissible amount some 10 months earlier when he donated to the Hoffa-Hobart slate. Halberg presented no evidence that he made his November 2005 contribution in response to a promise of continued employment in the event the Hoffa slate won the election. Therefore, Halberg has stated no basis upon which he is entitled to a refund of contributions.

Accordingly, we DENY the balance of the protest on its merits.

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

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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, 1725 K Street, N.W., Suite 1400, Washington, D.C. 20006-1416, 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
2007 ESD 401

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