

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

<b>IN RE: KENNY GONZALES,</b>	)	Protest Decision 2016 ESD 358
	)	Issued: December 30, 2016
<b>Protestor.</b>	)	OES Case No. P-035-081715-FW
_____	)	

Kenny Gonzales, member of Local Union 439, filed a pre-election protest pursuant to Article XIII, Section 2(b) of the Rules for the 2015-2016 IBT International Union Delegate and Officer Election (“Rules”). The protest alleged that he was removed from his position as steward in retaliation for activity protected by the *Rules*.

Election Supervisor representative Deborah Schaaf investigated this protest.

**Findings of Fact and Analysis**

Protestor Gonzales is employed by UPS in Stockton, CA. In the several years prior to the filing of this protest, he served as an alternate steward and then steward, being appointed to each position by the local union’s principal officer. The local union membership elected new officers in fall 2014 elections; they assumed office in January 2015. On July 22, 2015, principal officer Ken Guertin notified Gonzales that he was no longer shop steward effective that date. Gonzales received the notice by mail on July 25; he wrote Guertin on July 30 and again on August 16 and 31 asking why he was removed. Guertin did not reply. Gonzales filed this protest on August 17, 2015, alleging that he was removed as steward “because I have been participating in the upcoming Delegate Election.” The nominations meeting for Local Union 439’s delegates and alternate delegates election was conducted on February 17, 2016, nearly seven months after Gonzales was removed as steward.

Guertin denied that he removed Gonzales because of activity associated with the delegates election. He stated that Gonzales was appointed and not elected to his steward position by a previous principal officer, and that the local union bylaws grant the principal officer the right to appoint stewards. Because the bylaws bestowed this appointment authority on the principal officer, the principal officer also possessed the countervailing authority to terminate appointments.

Guertin cited three reasons for removing Gonzales. Thus, he asserted that Gonzales had interfered with “my guys,” referring to business agents employed by the local union. Further, he claimed UPS had too many stewards, making Gonzales’s continued service unnecessary. Finally, he stated that he had received “a few complaints” about Gonzales from members.

Our representative requested Guertin to present evidence to substantiate these justifications for removing Gonzales. Guertin did not explain or produce evidence to demonstrate how Gonzales had interfered with the work of local union business agents. Further, investigation showed that, following the removal of Gonzales as shop steward, UPS Stockton had more stewards than it had while he was a steward. Finally, despite our representative’s request, Guertin did not provide names of members and their contact information to substantiate the complaints Guertin claimed he received about Gonzales’s performance as steward.

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With respect to Gonzales's claim of protected activity, investigation showed that he and others with whom he eventually formed a slate in the delegates and alternate delegates election began circulating among local union worksites as early as March 2015, speaking with members about the upcoming election and their candidacies in it. Moreover, Gonzales assisted a member in filing internal union charges against some of the local union's business agents and executive board members. Further, Gonzales and others demanded access to the local union's financial records.

Also in March 2015, and after Gonzales and others began circulating at various worksites, Gonzales first noticed that he was no longer receiving usual reports from the business agent assigned to his facility, Cary Daughters, about grievances pending at his facility. In addition, Gonzales observed that he was not being included in "center level hearings" concerning grievances he had written and investigated. Having observed these changes in notice and participation, Gonzales questioned local union administration about the reasons for the changes. He received no reply.

On July 15, 2015, Gonzales, Reuben Moreno, and Mario Flores, all of whom would eventually form a slate of candidates together in the delegates and alternate delegates election, met at the local union hall with Daughters to discuss why Gonzales was being left "out of the loop." The conversation was moved outside the front door of the hall to avoid being overheard. The discussion among the four men was captured on security video, which recorded moving images but no audio. It showed Gonzales animatedly speaking with Daughters. Following this action, Moreno was seen stepping aggressively toward Daughters, who responded by taking one step back. Moreno continued his advance, in an aggressive manner, and threw a punch. Daughters responded with a punch. Individuals from inside the hall then went outside and stopped the confrontation. Gonzales was not involved in the physical altercation. No protest was filed concerning the incident.

A week later, on July 22, Guertin wrote Gonzales to advise that he was no longer steward at UPS. During the protest investigation, Guertin exclaimed to our representative that "they [referring to Gonzales, Moreno, and Flores] want to have a free run to do the things they want to do" without consequences, "just because they're running" in the delegates election. We regard this statement as an admission by Guertin that his removal of Gonzales was motivated at least in part by Gonzales's campaign activity.

The protest alleged retaliation for protected activity. Article VII, Section 12(a) describes activity protected by the *Rules* as follows:

All Union members retain the right to participate in campaign activities, including the right to run for office, to support or oppose any candidate, to aid or campaign for any candidate, and to make personal campaign contributions.

Article VII, Section 12(g) states that:

Retaliation or threat of retaliation by the International Union, any subordinate body, any member of the IBT, any employer or other person or entity against a Union member, officer or employee for exercising any right guaranteed by this or any other Article of the Rules is prohibited.

To establish a violation of this section, "the evidence must demonstrate that 1) the alleged victim engaged in activity protected by the *Rules*, 2) the charged party took adverse action against the alleged victim, and

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3) the protected activity was a motivating factor in the adverse action.” *Bundrant*, 2005 ESD 19 at 10 (October 25, 2005), *aff’d*, 05 EAM 4 (November 15, 2005) (quoting *Cooper*, 2005 ESD 8 (September 2, 2005). The Election Supervisor will not find retaliation if he concludes that the union officer or entity would have taken the same action even in the absence of the protestor’s protected conduct. *Gilmartin*, P32 (January 5, 1996), *aff’d*, 95 EAM 75. See *Leal*, P51 (October 3, 1995), *aff’d*, 95 EAM 30; *Wsol*, P95 (September 20, 1995), *aff’d*, 95 EAM 17.

We find that, beginning in March 2015 and continuing through and after the date Gonzales was removed as shop steward, he engaged in activity protected by the *Rules* by campaigning for delegate and by opposing local union officials he assumed would also run for delegate. As such, we find Gonzales satisfied the first element of the retaliation claim even though his protected activity occurred months before ballots were mailed in the local union’s delegates and alternate delegates election.

With respect to the second element, the evidence established that Gonzales suffered adverse action when he was removed from the steward position he held. *Williams*, 2001 EAD 152 (February 8, 2001); *Thornsberry*, 2001 EAD 172 (February 16, 2001); and *Bundrant*, 2005 ESD 19 (October 25, 2005), *aff’d*, 05 EAM 4 (November 15, 2005).

On the critical third element of the retaliation analysis, we find that a principal reason for removing Gonzales as steward was because of his protected activity. First, we conclude that Guertin admitted this motivation during the investigation. Moreover, we find that his stated reasons for the removal do not withstand factual scrutiny. Thus, there is no evidence that Gonzales interfered with business agents’ performance of their duties. Further, Guertin’s statement that Gonzales was removed in order to reduce the number of stewards at UPS was false, as the number increased after his removal. Finally, no evidence was presented or found that members had complained about Gonzales’s performance as steward. Therefore, we find a causal link between Gonzales’s protected activity and Guertin’s removal of him as steward.

Accordingly, we GRANT the protest. In doing so, we distinguish the result here from that reached in *Virtue & Ramos*, 2007 ESD 403 (July 9, 2007), *aff’d*, 2007 EAM 82 (October 5, 2007). There, a candidate and a supporter of that candidate were both removed from International representative positions following the candidate’s defeat in the 2006 International officers election. The protestors contended they were removed because of their protected activity in opposing the General President and his slate members. We denied the protest, holding that the *Rules* “protected [Virtue’s] right to run for office, but once the election is certified they do not shield him, or his avowed supporters, from termination from discretionary positions by the elected authority.” We noted in *Virtue & Ramos* that a different result could have obtained if the terminations had occurred at an earlier time. Thus, “[i]f a termination or demotion occurs during an election campaign, the Election Supervisor may investigate in response to a protest (or in his or her own discretion) to determine if the personnel decision was made to gain an electoral advantage, punish an opponent, or discourage opposition in violation of the *Rules*.” We find here that Guertin made his decision to remove Gonzales for each of these prohibited motives and thereby violated the *Rules*.

## **Remedy**

When the Election Supervisor determines that the *Rules* have been violated, he “may take whatever remedial action is deemed appropriate.” Article XIII, Section 4. In fashioning the appropriate remedy, the Election Supervisor views the nature and seriousness of the violation as well as its potential for interfering with the election process. “The Election Supervisor’s discretion in fashioning an appropriate remedy is broad and is entitled to deference.” *Hailstone & Martinez*, 10 EAM 7 (September 14, 2010).

We order Guertin to cease and desist from further violations of the *Rules*, including from prohibited retaliation for protected activity.

We further order Guertin to reinstate Gonzales to the position as steward Gonzales held before Guertin terminated his position. The reinstatement shall be accomplished no later than Friday, January 6, 2017, and the local union shall give Gonzales written notice by that date of his reinstatement as steward. If the local union has a practice of paying all or a portion of the monthly dues of its stewards, the local union shall reimburse to Gonzales the dues he paid that he would not have been required to pay had the dismissal as steward not occurred. Such reimbursement shall be made no later than Friday, January 6, 2017.

Finally, we order Local Union 439 to post on all union worksite bulletin boards the notice attached to this decision (only the notice and not the entire decision). The posting must be completed no later than Friday, January 6, 2017 and must remain posted through and including Friday, February 3, 2017.

No later than Monday, January 9, 2017, the local union must submit a declaration of compliance with all aspects of this remedy, made under penalty of perjury.

A decision of the Election Supervisor has immediate effect, unless stayed.

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:

Kathleen A. Roberts  
Election Appeals Master  
JAMS  
620 Eighth Avenue, 34<sup>th</sup> floor  
New York, NY 10018  
kroberts@jamsadr.com

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, 1050 17<sup>th</sup> Street, N.W., Suite 375, Washington, D.C. 20036, all within the time prescribed above. A copy of the protest must accompany the request for hearing.

Richard W. Mark  
Election Supervisor

cc: Kathleen A. Roberts  
2016 ESD 358

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Richard W. Mark  
*Election Supervisor*

**NOTICE TO ALL MEMBERS OF LOCAL UNION 439  
FROM THE IBT ELECTION SUPERVISOR**

The Election Supervisor has found that Ken Guertin, secretary-treasurer of Local Union 439, violated the *Election Rules* by removing Kenny Gonzales from his position as union steward at UPS Stockton.

The *Election Rules* grant members the right to campaign. The *Election Rules* prohibit retaliation against members who exercise their right to campaign. Guertin's removal of Gonzales from his steward's position violated the *Election Rules*.

The Election Supervisor will not permit any such violations of the *Election Rules*. The Election Supervisor has ordered Guertin not to violate the *Election Rules* again. The Election Supervisor has further ordered Gonzales reinstated to his position as steward. In addition, the Election Supervisor has ordered Local Union 439 to post this notice on all worksite bulletin boards the local union maintains.

The Election Supervisor has issued this decision in *Gonzales*, 2016 ESD 358 (December 30, 2016). You may read this decision at <https://www.ibtvote.org/Protest-Decisions/esd2015/2016esd358>.

Any protest you have regarding your rights under the *Rules* or any conduct by any person or entity that violates the *Rules* should be filed with Richard W. Mark, 1050 17<sup>th</sup> Street, N.W., Suite 375, Washington, D.C. 20036, telephone: 844-428-8683, fax: 202-774-5526, email: [electionsupervisor@ibtvote.org](mailto:electionsupervisor@ibtvote.org).

***This is an official notice of the Election Supervisor for the International Brotherhood of Teamsters and must remain posted on this bulletin board through and including February 3, 2017. It must not be defaced or covered up.***