OFFICE OF THE ELECTION SUPERVISOR
for the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

IN RE: FRANK PEREZ,	**)**	Protest Decision 2017 ESD 362
	)	Issued: January 5, 2017
Protestor.	**)**	OES Case No. P-145-020516-FW
	)	

Frank Perez, member and elected delegate of Local Union 630, 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 discharged from employment by Driftwood Dairy in retaliation for activity protected by the *Rules*.

Election Supervisor representative Michael Miller investigated this protest.

Findings of Fact and Analysis

Protestor Perez was nominated for delegate at Local Union 630's nominations meeting held January 8, 2016. Ballots were mailed in that local union's delegates and alternate delegates election on February 8 and counted on March 10, 2016. Perez was elected to a delegate seat to the IBT convention. He retained that seat despite a post-election challenge to his eligibility. *Eligibility of Perez*, 2016 ESD 210 (May 10, 2016).

That eligibility challenge was filed because Perez was discharged from employment with Driftwood Dairy, an employer under the jurisdiction of Local Union 630, on February 3, 2016. Perez alleged in the instant protest that he was dismissed from his employment because of his delegate candidacy.

Investigation showed that protestor Perez was hired by Driftwood on February 21, 2011 as a filler operator and worked both in that capacity and as a pasteurizer. He was dismissed less than five years later for violating four separate written standards, including the company's harassment policy, its safety handbook, its employee guidebook, and the collective bargaining agreement. Specifically, the company dismissed Perez because it credited an allegation that he sexually harassed a female co-worker and because he advised co-workers not to report to work on days that immediately followed their fifth consecutive workday.

The focus of the company's action was on Perez's encouragement of co-workers not to report for work on a so-called "sixth day," the work day scheduled following five consecutive work days. Article 10 of the collective bargaining agreement stated that "[a] full week's work shall consist of forty (40) hours within any five (5) scheduled days within the calendar week." The article continued that "[a]ll such employees shall have at least two (2) scheduled consecutive days off each calendar week." The "days off" provision was repeated in slightly different terms in Appendix B, Section 13 of the agreement, applicable to "plant employees" such as Perez. Thus, "[a]ll employees shall receive two (2) designated days off in every workweek which shall be posted. So far as possible, days off shall be consecutive." The provision granted the company the right to schedule employees to work on scheduled days off but required that "[t]ime worked at the Employer's request on an employee's day of rest shall be paid at the overtime rate." Investigation showed that, notwithstanding this provision, the company over time routinely mandated that employees work six straight days and often more, owing to production demands. This

practice prompted complaints and some grievances, beginning several years ago. Michael Casarez, a Driftwood production operator and member of Local Union 630 who formerly was a steward from 2011 to 2014, told our representative that he once filed a grievance after the company required him to work 28 consecutive days without a day off. The result of the grievance, according to Casarez, was that the company restored the five days on, two days off schedule to him that the contract specified. However, Casarez stated that he ceased being steward because of the complaints and grievances that resulted from the company scheduling other employees in violation of the days off provision. Protestor Perez became steward after Casarez stepped down. Casarez told our representative that, to his knowledge, the problems with enforcement of the days off provision continued under Perez's stewardship, and Perez responded to it by advising members that they could file grievances to protest the scheduling.

Evidence the company produced to the union, however, showed that Perez did more than merely advise members of their rights to file grievances. That evidence showed that Perez encouraged members to engage in "self-help" by not reporting for work when scheduled on a day off. Perez engaged in this practice himself on a date the company specified to the union, and the company obtained evidence that at least two other employees did not report for work on a scheduled day off because Perez advised them that they need not do so. The company regarded Perez's action in his own behalf and advising other employees to do likewise as willful failure and/or refusal to work.

The local union processed the grievance through the steps of the contractual grievance procedure, with the company denying the grievance at each step and firmly rejecting any offer of compromise. The grievance procedure thus exhausted, the local union considered whether to appeal the case to binding arbitration. Before doing so, the executive board referred the case to the local union's attorney, who reviewed the facts and documents supporting the case and met with Perez. In advance of the conference with the attorney, Perez agreed that the attorney's opinion as to whether the case should be appealed to arbitration would be binding on him.

The attorney concluded that the case should not be arbitrated because it stood little likelihood of success before an arbitrator. The factors supporting the attorney's opinion were these: 1) Perez had relatively short tenure with the company (less than five years); 2) he had a disciplinary history for other misconduct that included an oral warning, written warning, final written warning, suspension, and employee conference; and 3) his termination was for flagrant and willful misconduct that essentially encouraged a work stoppage. The attorney reviewed the "work now, grieve later" rule that arbitrators routinely enforce, which generally requires that employees work as directed by the employer, except for instances where the work will either require the employee to perform an unlawful act or will subject the employee to unreasonable risk of injury or death. A complaint that the directive to work will merely violate the contract is not sufficient cause for refusing or failing to perform the work and instead will be regarded as insubordination. Based on this review, the attorney concluded that "an arbitrator will find it easy to agree with the Company that [Perez] acted both *flagrantly* and *willfully* in his behaviors and actions towards his co-workers." Accordingly, the attorney recommended the union not pursue the grievance to arbitration, and the union adopted this recommendation by withdrawing the grievance.

Investigation of the protest revealed no evidence to suggest that the company was aware of Perez's candidacy for delegate, let alone was motivated to discharge him because of it. Further, although union officials who processed his grievance were aware of his candidacy, investigation showed that Perez did not advance his candidacy as a reason for the company's treatment of him or the union's decision not to arbitrate his case.

Protests alleging retaliation for protected activity require proof that the adverse action the protestor suffered was causally connected to the protected activity. Here, we find none.

Accordingly, we DENY the protest.

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, 34th 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 17th 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
2017 ESD 362

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