

**ELECTION APPEALS MASTER
FOR THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

**IN RE: COLLEEN BRADY,
LETITIA RAMIREZ ZIVALICH
and SHAWN ELLIS,

Protestors.**

**2023 EAM 26
ISSUED: November 8, 2023**

**APPEAL OF ELECTION SUPERVISOR
PROTEST DECISION 2023 ESD 189**

**OES CASE NOS. P-207-032422-NA,
P-208-032422-NA, P-214-032522-NA**

The International Brotherhood of Teamsters (“IBT”) appeals Protest Decision 2023 ESD 189 (the “Decision”), issued on May 25, 2023 by the Election Supervisor. In the Decision, the Election Supervisor found that the IBT retaliated against three union appointed employees for engaging in protected political activity. More specifically, the Election Supervisor determined that upon taking office the newly elected IBT administration terminated the employees in retaliation for exercising their rights, in violation of Article VII, Section 12(g) of the Rules for the 2020-2021 IBT International Union Delegate and Officer Election (the “Rules”). To remedy the violation, the Election Supervisor ordered the IBT, among other things, to reinstate the employees to the position each of them held at the time the IBT discharged them, to expunge their employment records of any reference to the dismissals, and to restore their seniority without break in service. The employee-protestors also appealed the Decision, arguing that the remedy ordered by the Election Supervisor was insufficient and that the IBT should also be required to provide public notice of the remedy to all IBT members and employees.

For the reasons set forth below, the Decision is affirmed.

I. Procedural History

In its May 25, 2023 Decision, the Election Supervisor granted the post-election protests filed by IBT International auditors Colleen Brady and Letitia Zivalich, as well as Shawn Ellis,

who was a trainer in the IBT's Training and Education Department for the IBT's Central Region. Each protestor claimed that they were fired because they supported the incumbent slate in opposition to the O'Brien-Zuckerman slate during the 2020-2021 International Officers election campaign. On May 26, 2023, the IBT appealed the decision in all respects. On May 31, 2023, the protestors appealed the Election Supervisor's Remedy. On May 30, 2023, by Notice of Hearing, the Election Appeals Master scheduled a virtual hearing for June 20, 2023. On June 12, 2023, the IBT and the protestors submitted supplemental briefs in support of their respective positions. On June 16, 2023, the Office of Election Supervisor submitted its written responses to both the IBT and the protestors' submissions. On June 16, 2023, the IBT filed an additional brief in opposition to the protestors' appeal of the remedy.

A virtual hearing was held on June 20, 2023. The following individuals attended the hearing: Richard W. Mark, Esq., and Jeffrey J. Ellison, Esq. on the behalf of the Election Supervisor; Brian T. Kelly, Joshua C. Sharp and Christopher J. Stevens on behalf of the IBT; Patrick J. Szymanski, Esq., on behalf of the protestors; and Ms. Brady, Ms. Zivalich and Mr. Ellis.

II. Background

On December 7, 2021, it was determined that the O'Brien-Zuckerman slate of candidates had won the 2020-2021 IBT International Officer's Election and defeated the Vairma-Herrera slate. Sean O'Brien became the IBT's new General President. During the transition period following the election, the newly elected officers commissioned a review of various IBT staff to determine who should be retained.

The new administration took office on March 22, 2023, and on the following day terminated the protestors. The protestors claimed that they were terminated for exercising their

protected rights under the Rules: Ms. Brady had expressed her opposition to Sean O'Brien's candidacy for General President; Ms. Zivalich had supported and made monetary contributions to an opposition candidate; and Mr. Ellis contributed the maximum amount of political donations to candidates on an opposing slate as well as the slate's legal and accounting fund. The IBT denied that it retaliated against the employees.

III. Decision

The Rules provide 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." Article VII, Section 12(g). In order for termination from IBT employment to constitute retaliation, the evidence must demonstrate that "(1) the alleged victim engaged in activity protected under the Rules; (2) the charged party took adverse action against the alleged victim; and (3) the protected activity was a motivating factor in the adverse action." See *Bundrandt*, 2005 ESD 19 at 10 (October 23, 2005), *aff'd*, 05 EAM 4 (November 15, 2003) (*quoting Cooper*, 2005 ESD 8 (September 2, 2005)).

It is also well settled that the "standard of review of the Election Supervisor's factual findings, including its credibility determinations, is abuse of discretion." See *Gonzalez*, 2017 EAM 38 (January 24, 2017), *citing*, *Taylor & Fabiano*, 2011 EAM 34 (April 13, 2011); *Eligibility of Swain*, 2011 EAM 20 (February 22, 2011); *Hailstone & Martinez*, 2010 EAM 7 (September 14, 2010); *see also Theurer*, 2021 EAM 20 (September 24, 2021) and *Johnson*, 2021 EAM 15 (March 22, 2021). The Election Supervisor abuses its discretion "when the facts found are clearly erroneous." *Id.* Thus, the factual findings of the Election Supervisor "must be based

on objective fact or observation” and should be “justified.” *See Johson*, 2021 EAM 15 (March 22, 2021), *citing Richards*, 00 EAM 4 (August 29, 2000).

In making employment decisions following an election, the IBT is given wide latitude to retain or dismiss employees. *See Walker et. al.*, 2023 ESD 188 at 7 (January 24, 2023), *quoting Garret*, SR-03-IBT-EOH at 5 (May 20, 1999) (“[w]hen a new administration starts, terminations and appointments may fairly be found to reflect policy choices...”); *see also Gilmartin*, P32 (January 5, 1996), *aff’d*, 95 EAM 75; *Leal*, P51 (October 3, 1995), *aff’d*, 95 EAM 30; *Wsol*, P95 (September 20, 1995), *aff’d*, 95 EAM 17. In addition, the IBT may base its employment decisions on “personality conflicts” or “political rivalry.” *See Cobey*, 2022 ESD 185 (April 5, 2022), *citing Hoffa*, P-812-IBT-NYC (August 16, 1996).

However, “removal in furtherance of a policy objective is different from taking a job action on account of a member’s participation (or failure to participate) in campaigning or other election-related activity.” *Walker*, 2023 ESD 188 at 7 *quoting Gasman*, SR-02-IBT-EOH (May 25, 1999). In sum, the Rules and prior precedent make clear that employment decisions cannot be motivated by an employee’s protected campaign activity.

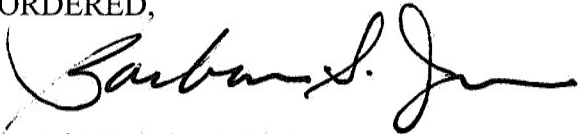
For example, in *Walker*, a companion case, where the IBT dismissed 21 employees in the Organizing Department, the Election Supervisor found that there were sufficient reasons provided for termination and that the employees’ campaign activity was not a motivating factor in the IBT’s employment decision.¹ *See Walker*, 2023 ESD 188 (January 24, 2023). That is not the case here. In each of the matters before me, the Election Supervisor determined that a violation had occurred because the employees were terminated for engaging in protected activity.

¹ An appeal in *Walker* was dismissed by the Election Appeals Master for lack of standing. *See Walker et. al.*, 2023 EAM 25 (February 28, 2023).

Based on the record, the Election Supervisor's findings were not clearly erroneous nor were they against the weight of the evidence. Accordingly, I do not find the Election Supervisor abused its discretion.

Lastly, there is no reason to disturb the Election Supervisor's remedy in this matter as it appropriately meets the goals of ensuring a fair election process. See *Halstead*, 2021 EAM 19 (August 12, 2021), citing, *Hailstone & Martinez*, 10 EAM 7 (September 14, 2010) and *Gegare*, 10 EAM 1 (June 14, 2010) ("It is well settled that the Election Supervisor's discretion in fashioning an appropriate remedy is broad and is entitled to deference, and that the remedy selected by the Election Supervisor will not be disturbed except where there has been an abuse of discretion.").

SO ORDERED,

A handwritten signature in black ink, appearing to read "Barbara S. Jones". The signature is fluid and cursive, with a large initial "B" and "J".

Hon. Barbara S. Jones (Ret.)
Elections Appeals Master

DATED: November 8, 2023

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