

IN RE:

ALEXANDRA POPE,

00 - Elec. App. – 011 (KC)

This matter is an appeal from the Election Administrator's decision, dated October 17, 2000, Office of the Election Administrator Case No. PR060501AT, Protest Decision 2000 EAD 39. The request for a hearing was filed by Barbara Harvey, Esq. on October 20 and 30, 2000 and Paul Alan Levy, Esq. on October 20, 2000.

A hearing was held before me on October 31, 2000. The following persons were heard by way of teleconference: Jeffrey Ellison, Esq. for the Election Administrator's Office; Robert M. Baptiste, Esq. of Baptiste & Wilder, P.C., on behalf of Local 728; Bradley T. Raymond, Esq. of Finkel, Whitefield, Selik, Raymond, Ferrara & Feldman on behalf of the International Brotherhood of Teamsters; Betty Grdina, Esq. of Yablonski, Both & Edelman on behalf of the Tom Leedham Campaign; Barbara Harvey, Esq. on behalf of Greg Charron; Paul Alan Levy, Esq. of the Public Citizen Litigation Group on behalf of Doug Mims and Jimi Richards; and Doug Mims, business agent .

On August 1, 2000 the Election Administrator filed a decision in 2000 EAD 1 which resolved the protest allegations presently before us in this matter. On August 4, 2000 the Election Administrator withdrew his decision in 2000 EA 1 (See 2000 EAD 4). No objections to this withdrawal were filed with the Election Administrator and no timely appeal attacking the withdrawal was filed with me. Numerous withdrawals of decisions of record by previous Election Officers have occurred without incident or challenge. The practice is a sound one, since the Election Administrator would be duty bound to bring to the attention of the Election Appeals

Master on any appeal challenging the validity of a decision of record, any undisclosed weakness in his conclusions. Furthermore, no harm accrues to any party, since a full de novo review and appeal protects everyone's rights under the Election Rules. References to and reliance upon Federal Rule of Civil Procedure 60(b) are completely inapposite, since that Rule vests limited motion rights in litigants in Federal Courts (not parties to the Election Rules) who seek to challenge and reopen by motion, judgments or decisions of Courts that are final. Here, of course, no party moved for reconsideration of the Election Administrator's decision. The withdrawal was a spontaneous action of the investigative tribunal, to protect the integrity of its own decision. Courts always have the right, absent loss of jurisdiction or an explicit procedural time bar, to reopen sua sponte their own decisions or judgments that they believe are flawed or defective. Accordingly, objections of parties to the withdrawal of 2000 EA 1 by the Election Administrator are rejected as having no merit.

The case before us involves a finding by the Election Administrator that Waymon Stroud, president of Local 728, terminated Douglas Mims and Jimi Richards as business agents in the Local, in retaliation for election activity in support of Mims, in violation of Article VII, Section 11(a) & (g) and Article XII of the Rules.

The Election Administrator concluded that the basis given by Stroud for the termination of Mims, financial constraints in the Local, was pretextual, and deduced therefore that the motivating factor was in fact retaliation for Mims' electoral candidacy. Although the Election Administrator did in fact conclude that "Local 728 is not in a strong financial condition," which tends to support Stroud's justification for Mims' termination, two other factors persuaded the Election Administrator that Stroud's real objective was to discourage and/or punish Mims as a candidate for Union office under the Rules.

First, the Election Administrator credited the statement of Greg Charron, a political ally of Mims, that he heard Vince Hickman, an aide to General President Hoffa, state in a telephone call to an unidentified third party, in connection with a deadlock in a vote of the Local's Executive Board on October 29, 1999 that "it looks like a split board and [ ] it was all Mims' fault[ ] Mims had his nose in everything and [I] [Hickman] would see him out no matter what." Decision of the Election Administrator, at 7. The problem with relying on this statement as supporting the notion that the termination was not related to the financial condition of the Local but was in fact election based, is that this statement, even if credited, and factually attributable to Stroud, reveals Hickman's de facto motive for Mims termination as not election based at all, but rather as retaliation for Mims causing a deadlock in the Executive Board meeting.

Second, the Election Administrator finds that Stroud gave "shifting explanations" for the firing of Jimi Richards, not a candidate but a political associate of Mims. Initially, as noted, Stroud ascribed the termination to financial weakness in the Local ("reason one"). Later, he stated that the termination was also supported by Richards' poor performance ("reason two"). Both of these justifications were found by the Election Administrator to have some factual basis in the record. See Decision at 6-7, 10. It is therefore puzzling how reason one, factually based, and "reason two," also fact based can as a matter of sound fact-finding be transformed into reason three (election related retaliation) which has no objective factual basis in the record. Furthermore, the "shifting explanations" doctrine, principally found in Title VII cases to establish pretext, usually applies where the explanations given are not supported by objective evidence, or where the explanations are mutually exclusive. Where a fact-based justification is augmented by a second fact based justification, they cannot support the inference of pretext.

Indeed, after finding that Stroud's dismissal of Mims and Richards constituted election related retaliation, the Election Administrator then went on to find as a fact that neither Mims nor Richards were candidates for office under the Rules. This outcome neatly exposes the perils of inferring bad motives from an individual's objectively benign conduct.

Accordingly, the Election Administrator's factual finding that Stroud's termination of Mims and Richards constituted retaliation under the Rules is reversed. The Election Administrator's decision that Mims was not a candidate entitled to protection against retaliation under the Rules is affirmed.

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Kenneth Conboy  
Election Appeals Master

Dated: November 14, 2000