UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES,

Plaintiff,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Defendant.

APPLICATION 156 (In re James Deamicis and Thomas Flaherty)

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88 CV 4486 (LAP)

ORDER

LORETTA A. PRESKA, Chief United States District Judge:

Before the Court is Application 156 of the Independent Review Board ("IRB") of the International Brotherhood of Teamsters ("IBT") concerning disciplinary actions taken against IBT members James Deamicis and Thomas Flaherty. Deamicis and Flaherty were charged with bringing reproach upon the IBT and injuring members in violation of the IBT Constitution and Local 82 bylaws by acting in concert with the Local's then-Secretary-Treasurer and principal officer John Perry and then-President Patrick Geary selectively to enforce unauthorized voting rules concerning members' voting on a proposed collective bargaining agreement in 2009. Deamicus was also charged individually with bringing reproach upon the IBT and violating the IBT Constitution and Local 82 bylaws by continuing to exercise the rights of union membership while not a member in good standing due to his failure to comply with the terms of discipline previously imposed upon him by the Local's Executive Board.

The IRB, upon finding the IBT's decision to dismiss these charges inadequate, conducted a *de novo* hearing on the charges on October 11, 2011. By decision dated January 24, 2012 (the

"IRB Decision"), the IRB concluded that the charges were established. As a penalty for the misconduct, the IRB permanently expelled Deamicis from the IBT and barred Flaherty from membership, office, or employment with the IBT for a period of five years.

Background

A. Factual Background

1. The 2009 Collective Bargaining Agreement Ratification Votes

IBT Local 82 is located in South Boston, Massachusetts, and its members work in the trade show industry. In 2009, proposed trade show collective bargaining agreements were subject to ratification votes, including, among others, those between Local 82 (the "Local") and employers Freeman Decorating Company ("Freeman") and Greyhound Exposition Services ("GES") (all together, the "2009 contracts").

Local 82 bylaw section 14A-13 states that the Executive Board shall determine how the membership shall vote on agreements and provides that the Board can adopt rules and regulations concerning the voting process. (Ex. 77 at 14).[2] Perry created rules governing voter eligibility for the 2009 ratification votes, but the rules were never approved by Local 82's Executive Board and thus were never authorized. (Ex. 1 at 50-54; Ex. 209 at 2-5). Perry's voter eligibility rules provided as follows:

> Members vote only on one contract. List employees[3] vote for the companies which they have seniority for. If someone works the same amount for more than one company, they are able to choose which contract to vote on. This is the only procedure, policy, rule or regulation governing Collective Bargaining ratification votes.

[2] As used herein, "Ex." refers to the exhibits the Chief Investigator introduced into evidence during the hearing before the IRB. Citations to the transcript of the IRB hearing conducted on October 11, 2011 are referred to as "IRB Tr. at __."

[3] List employees were union members on a company's seniority list.

(Ex. 207 at 2; Ex. 209 at 3; Ex. 1 at 47). According to Perry, "spares" – members who were not on any company's seniority list – were permitted only to vote for the company for which they worked the most hours. (Ex. 1 at 47; *see also id.* at 50-51; Ex. 11 at 50-51). In addition, in order to be eligible to vote on a proposed contract, the IBT Constitution and the Local's bylaws required members to be current on dues through the month prior to the vote. (Ex. 77 at 18, 26; Ex. 390 (Art. X, sec. 5(c))).

The proposed 2009 contracts were controversial among union members due to the exclusion of the so-called "2003 language" which provided seniority for spares who had relevant trade show experience prior to April 1, 2003. (Ex. 99 at 7-8; Ex. 144 at 34; Ex. 210 at 27-28; IRB Tr. at 80). Most of the Local's members were spares and thus were directly affected by this provision. (*See* Ex. 212 at 28-29; Ex. 210 at 17).

Perry, Deamicis, and Flaherty all favored removal of the 2003 language. (Ex. 212 at 18-19, 28-29; IRB Tr. at 80; *see also* Ex. 54 at 53-54). Indeed, Deamicis, along with Perry and Geary, served on the GES negotiating committee which proposed a contract to the members that eliminated the 2003 language. (IRB Tr. at 78).

There were three votes on the proposed contract with Freeman. (Ex. 209 at 5-6; IRB Tr. at 29; Ex. 19 at 28). The union members rejected the contract the first two times it was voted upon but ratified it on the third vote. (Ex. 209 at 5-6; IRB Tr. at 29). Immediately prior to the second vote, which occurred on Saturday, April 18, 2009 (Ex. 209 at 5; IRB Tr. at 30-31), Perry held a meeting with union members to discuss the contract (Ex. 210 at 27-31; Ex. 212 at 14-20; IRB Tr. at 31-32), which, as noted, was controversial among the members because it eliminated the 2003 language. (IRB Tr. at 31-32, 80; Ex. 213 at 46; *Compare* Ex. 89 *with* Ex. 99). At the meeting, Perry advocated for the abandonment of the 2003 language (Ex. 210 at 27-29; Ex. 212

at 14-15, 19-20). Paul McManus, a steward at Freeman and a member of the Freeman contract negotiation committee, recommend against approval of the contract because the 2003 language had been omitted. (IRB Tr. at 27-28, 31-33; Ex. 210 at 27-28). The meeting became rowdy, and Perry called it off. (IRB Tr. at 32; Ex. 213 at 46; Ex. 212 at 14-20). The contract was voted down. (Ex. 209 at 5-6). After the vote, Perry called McManus a "coward" (Ex. 210 at 30), and Flaherty, who was serving as the sergeant at arms, told McManus he was "ruining people's livelihood." (IRB Tr. at 33-35; *see also* Ex. 212 at 28-29; Ex. 213 at 47-48).

Shortly after the members voted down the Freeman contract, members voted on the GES contract, which also omitted the 2003 language. (Ex. 209 at 5; Ex. 210 at 27-29). The GES contract passed. (Ex. 217; Ex. 209 at 5; Ex. 88).

At the GES ratification vote, however, more ineligible voters than eligible voters were permitted to vote on the contract, and the voter eligibility rules were applied inconsistently in a manner that appeared calculated to guarantee ratification.[4] (Ex. 380). As per Perry's voter eligibility rules, GES list men were allowed to vote, along with spares who worked most of their hours for GES. (Ex. 1 at 47). Members who were on another employer's seniority list, who worked primarily in the moving industry or whose dues were not current through the month preceding the vote, were not eligible to vote on the GES contract. (Ex. 1 at 47). Applying these rules, only 24 Local 82 members were eligible to vote on the GES contract. (Ex. 13; Ex. 413; Ex. 417). However, 79 members were actually permitted to vote, and 62 of those voters – or 78% – were in fact ineligible. (Ex. 380; Ex. 13; Ex. 217; Ex. 39). As to those ineligible members who were permitted to vote on the GES contract:

[4] The Local did not keep records of voters on proposed contracts that had been rejected, such as the members who voted in the second Freeman ratification vote. (Ex. 1 at 143).

- 55 were ineligible spares under Perry's voter eligibility rules. (Ex. 381; Ex. 217; Ex. 417; Ex. 39). None of those spares worked for GES in 2009 (Ex. 381; Ex. 39), and 65% of them joined Local 82 after April 1, 2003, and thus stood to benefit from the removal of the 2003 language (Ex. 382; Ex. 383);
- 40 were delinquent in paying dues, notwithstanding that the sergeants at arms had a dues printout at the vote to check the dues status of members. (Ex. 380; Ex. 302; Ex. 11 at 54-55; Ex. 54 at 54; IRB Tr. at 121-123);
- at least 13 had ties to Perry, Deamicis, Flaherty, or Burhoe, including, for example, Flaherty's wife, and Deamicis's co-defendant in a 1992 criminal case (Ex. 217; Ex. 54 at 11-14; Ex. 380; Ex. 39);
- at least 5 were known by Deamicis and Flaherty to be employed in the moving industry (IRB Tr. at 76-77, 124-125, 130-131; Ex. 300 at 132-134; check Ex. 54 at 17-19; Ex. 19 at 28-29; Ex. 11 at 52; Ex. 39; Ex. 381; Ex. 217; Ex. 27; Ex. 27A), and each joined Local 82 after April 1, 2003 (Ex. 323; Ex. 343; Ex. 348; Ex. 361; Ex. 372).

In contrast to the members who were allowed to vote despite their ineligibility, at least 10 spares who were ineligible under Perry's voter eligibility rules were excluded from the GES vote. (Ex. 217; Exs. 220, 221, 227, 228, 230, 232, 233, 234, 237, 238, 239). Nine of those spares, however, were members of the Local in the trade show industry prior to April 1, 2003, and thus would be harmed by the passage of the GES contract and exclusion of the 2003 language. (Exs. 402, 382, 220, 227, 230, 232-234, 237-239, 263, 409-410).

In addition, Perry hired a police officer to control members' access to the gate to the union hall, which was the sole point of entry to the GES vote. (IRB Tr. at 37-38, 42, 63, 87, 104, 114-115, 131-132, 143-147; Ex. 249). As relevant here, along with the police officer, Perry, Deamicis, and Flaherty monitored the gate. Perry and the sergeants at arms – who included Flaherty[5] – were responsible for, among other things, ensuring enforcement of voter eligibility rules, including Perry's unauthorized voting rules and the rule requiring that voters be current on union dues (IRB Tr. at 121-125; Ex. 1 at 54-57, Ex. 19 at 27-29; Ex. 54 at 54; Ex. 11 at 54-55). Photographs taken on the date of the GES vote show, among others, Perry, Flaherty, Deamicis,

[5] Perry appointed Flaherty as the sergeant at arms to monitor each of the 2009 ratification votes. (IRB Tr. at 123, 128; Ex. 1 at 54-55; Ex. 19 at 27).

and the police officer at the gate (Ex. 249), although the extent of Deamicis' and Flaherty's involvement was the subject of conflicting evidence. Deamicis, who attended most of the 2009 ratification votes even though he was not eligible to vote on any union contracts (IRB Tr. at 77-78; Ex. 54 at 49, 56, 61-62; Ex. 301; Ex. 13; Ex. 75; Ex. 76), also manned the gate to the union hall during the GES vote (*See* IRB Tr. at 79, 85, 87, 249; Ex. 300 at 132-134). During the GES vote, a number of Local 82 members signed a sheet indicating that they were denied access to the vote. (Ex. 432). As noted above, the GES contract passed.[6]

On June 25, 2010, the IRB sent questionnaires to 29 Local 82 members who had signed a statement claiming that they were not allowed to vote on the GES contract. Of the 23 members who responded, 19 swore under oath that they were denied entry to the GES vote. (Exs. 220, 227, 228, 229, 230, 232-239, 248-257). A number of these members submitted sworn written statements indicating that Deamicis and/or Flaherty were involved in denying them entry to the vote. (*See, e.g.*, Exs. 227, 230, 228, 229, 252, 234).

2. Deamicis's Previous Suspension

On April 8, 2005, Deamicis was charged with pretending to be a business agent and diverting work from Local 82 members for his personal gain. (Ex. 74; Ex. 54 at 60-62). Following a hearing by the Local 82 Executive Board on April 28, 2005, the charge was found proven. (Ex. 54 at 61-62; Exs. 75-76). Deamicis was suspended from membership for one year, and fined $3,000. (Ex. 75-76). Deamicis failed to pay the fine fully until October 5, 2010, the day after President Hoffa filed the IRB-recommended charges against him. (Ex. 301; Ex. 400;

[6] The third and final vote on the Freeman contract took place on June 22, 2009. (Ex. 209 at 6). Unlike the previous votes, the Freeman vote was held on a weekday, at an inconvenient time and location. (Ex. 209 at 6; IRB Tr. at 44-45; 66-67). Flaherty again served as a sergeant at arms, and Deamicis was also present, notwithstanding that he had already voted and was otherwise ineligible to vote. (IRB Tr. at 77-78, 123, 126, 128; *see also* Ex. 300 at 136). The Freeman contract finally passed. (Ex. 209 at 6).

see also IRB Tr. at 120-121; Ex. 54 at 61-64). Until that time, Deamicis remained suspended pursuant to the IBT Constitution and Local 82 bylaws. (Ex. 77 at 27(22); Ex. 78 at 11(151)).

During his suspension, Deamicis continued to exercise rights and benefits of union membership. Among other things, Deamicis was appointed on multiple occasions as the Local's Chief Steward, for which his dues were reimbursed (*see* IRB Tr. at 75-76; Ex. 1 at 73-74, 139; Ex. 54 at 22-25; Ex. 72; Ex. 73; Ex. 301); helped found and lead the Local's strike unit (*see* IRB Tr. at 76; Ex. 54 at 23-24; Ex. 33 at 19; Ex. 19 at 51); represented the Local as a member of the GES contract negotiation committee (*see* Ex. 1 at 65-66); was appointed to serve as an alternate for then-Vice President Frederick Perry during the Executive Board disciplinary hearing on a charge brought against a member, and actually served (*see* Exs. 94, 97); and attended both Executive Board and Local General Membership meetings (*see* Exs. 12, 82, 273, 274, 280, 289, 291, 292).

B. Procedural Background

On September 29, 2010, the IRB recommended that the IBT file charges against two officers and four members of Local 82: Secretary-Treasurer Perry, President Geary, Joseph Burhoe, James Young, Deamicis, and Flaherty. As relevant here, the IRB recommended that Deamicis and Flaherty be charged with bringing reproach upon the IBT and injuring members in violation of the IBT Constitution and Local 82 bylaws through creating and selectively enforcing unauthorized rules concerning members' voting on the proposed contract with GES in 2009. The IRB also recommended that Deamicis be charged with bringing reproach upon the IBT and violating the IBT Constitution and Local 82 bylaws by continuing to exercise the rights of union membership while not a member in good standing and under continuing suspension after failing to comply with terms of discipline previously imposed by the Local's Executive Board. Finally,

as to Perry, the IRB recommended that the IBT file a host of disciplinary charges, including, among other things, the same charges levied against Deamicis and Flaherty, as described above.

By letter dated October 4, 2010, IBT General President James Hoffa determined to adopt and file the above-referenced charges contained in the IRB's recommendation. On February 7, 2011, Perry entered into a settlement agreement to resolve the IRB-recommended charges. Pursuant to this agreement, he permanently retired from the IBT and agreed never to hold IBT membership. He further agreed never to participate in the affairs of Local 82 and any other IBT entity. The District Court approved this agreement on February 22, 2011. (Dkt. No. 4205).

The charges against Deamicis and Flaherty were heard by a union panel on February 15, 2011. The panel recommended that all charges be dismissed. President Hoffa adopted the panel's recommendations and reissued them as his own.

By letter dated June 7, 2011, the IRB informed President Hoffa that his decision to dismiss the charges against Deamicis and Flaherty was inadequate. The IBT, however, adhered to its original determination.

Thus, in accordance with its Rules, the IRB scheduled a hearing on the charges against Deamicis and Flaherty. On October 11, 2011, the IRB held its hearing in Boston, Massachusetts. At the hearing, Deamicis and Flaherty were represented by Local 82 member Gerald Spagnuolo and were provided an opportunity to respond to the charges and cross-examine the witnesses who testified against them. The IRB also admitted into evidence approximately 433 exhibits, including, *inter alia*, sworn depositions and IBT hearing testimony, sworn witness statements, photographs, and various schedules of union members who voted on several of the proposed 2009 contracts.

The IRB issued its decision on January 24, 2012, unanimously finding that the charges had been established. Because Deamicis knowingly violated the terms of a prior suspension, the IRB permanently barred him from holding union membership, position, or employment, and from accepting any union compensation, with the exception of fully vested pension and welfare benefits. Flaherty, who had no prior record of bringing reproach upon his Local, was barred for a period of five years from holding union membership, position, or employment and from accepting any union compensation, with the exception of fully vested pension and welfare benefits.

IRB Application 156 followed. The IBT, Deamicis, and the Chief Investigator each made submissions to this Court. The IBT, by letter dated January 30, 2012, informed the Court that it "accepts the IRB's decisions." (Jan. 30, 2012 Ltr. at 1). While expressing concerns about the "nature and quality" of the evidence at issue, as well as the severity of the penalties imposed, the IBT "nevertheless acknowledge[s] the deference that is generally given to IRB's findings, including its choice of penalties," and "has taken appropriate steps to ensure that they are implemented." (*Id.* at 1-2). Deamicis filed a memorandum and a reply memorandum opposing IRB Application 156 on or about April 17, 2012. Deamicis does not argue that the IRB's decision is not supported by substantial evidence; rather, he argues only that the underlying investigation leading to the charges against him was tainted by conflicted counsel. Finally, on May 4, 2012, the Chief Investigator filed a memorandum in support of Application 156. Flaherty did not make any submission.

Discussion

I. Standard of Review

The standards governing review of IRB disciplinary decisions are well established. This Court reviews determinations made by the IRB under an "extremely deferential standard of review." *United States v. IBT ("Carey & Hamilton")*, 247 F.3d 370, 379 (2d Cir. 2001); *United States v. IBT ("Hahs")*, 652 F. Supp. 2d 447, 451 (S.D.N.Y. 2009). The IRB Rules, which were approved by this Court and the Court of Appeals, provide for review of decisions of the IRB under "the same standard of review applicable to review of final federal agency action under the Administrative Procedure Act." IRB Rules ¶ O; *see United States v. IBT ("IRB Rules")*, 803 F. Supp. 761, 805-06 (S.D.N.Y. 1992), *aff'd as modified*, 998 F.2d 1101 (2d Cir. 1993). Under this extremely deferential standard, an IRB decision may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Carey & Hamilton*, 247 F.3d at 380 (quoting 5 U.S.C. § 706(2)(A)); *Hahs*, 652 F. Supp. 2d at 451.

In accordance with that standard, this Court reviews "the IRB's findings of facts for 'substantial evidence' on the whole record." *United States v. IBT ("Giacumbo")*, 170 F.3d 136, 143 (2d Cir. 1999). "The substantial evidence test is deferential." *Id.* "Substantial evidence is 'something less than the weight of the evidence,'" *United States v. IBT ("Simpson")*, 120 F.3d 341, 346 (2d Cir. 1997), "but something 'more than a mere scintilla,'" *id.* (quoting *United States v. IBT ("Cimino")*, 964 F.2d 1308, 1311-12 (2d Cir. 1992)). "Substantial evidence includes such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotations omitted). Moreover, the mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent [the IRB's] findings from being supported by substantial evidence." *Carey & Hamilton*, 247 F.3d at 380 (citations omitted). "The IRB's

findings cannot be overturned merely by identifying alternative findings that could potentially be supported by the evidence. . . . Rather, the Court must find that the evidence not only supports [a contrary] conclusion, but *compels* it." *Hahs*, 652 F. Supp. 2d at 451-52 (internal citations and quotation marks omitted).

Moreover, "[i]t is well settled that," where, like here, "a district court reviews penalties imposed by the IBT in accordance with the Consent Decree," it applies an "arbitrary and capricious standard." *Hahs*, 652 F. Supp. 2d at 461 (internal citations and quotation marks omitted). In reviewing sanctions, "this Court asks only whether the sanction imposed represents an allowable judgment in the choice of remedy." *Id.* This Court should not overturn the "choice of sanctions unless it finds the penalty unwarranted in law or without justification in fact." *Id.*

II. The IRB's Determinations Are Affirmed

Applying these standards, the IRB's determinations with respect to Deamicis and Flaherty are affirmed for the reasons set forth below.

A. Bringing Reproach Upon the IBT by Selectively Enforcing Unauthorized Voting Rules

1. Substantial Evidence Supports the IRB's Decision That Perry's Voter Eligibility Rules Were Selectively Enforced to Achieve Passage of the 2009 GES Contract

First, substantial evidence supports the conclusion that Perry's unauthorized voting rules were selectively enforced so as to achieve passage of a collective bargaining agreement with GES that omitted the 2003 language. Following the union's rejection of a contract proposal with Freeman, which also omitted the 2003 language (Ex. 209 at 5; Ex. 99 at 7-8; Ex. 210 at 27-29), Perry, with the assistance of Deamicis and Flaherty, allowed more ineligible union members than eligible members to vote of the GES contract and selectively applied Perry's rules to bar certain ineligible members but not others. Specifically, 78% of the union members who voted on the

GES contract were ineligible to vote on that contract. (Ex. 380.) The breakdown of which ineligible members were and were not permitted to vote on the GES contract, as detailed above, constitutes proof that such selection was not inadvertent but designed to ensure passage of the contract. Ex. 380, *United States v. IBT ("Salvatore")*, 754 F. Supp. 333, 339 (S.D.N.Y. 1990) (circumstantial evidence is of no less value than direct evidence and appropriate to consider in an internal union disciplinary hearing).

Perry took other actions designed to ensure the passage of the 2009 contracts. For example, after the proposed Freeman contract was initially voted down by union members and union members engaged in heated debates about the omission of the 2003 language (IRB Tr. at 31-32, 33-35, 60-61; *see also id.* at 80; Ex. 213 at 46-48; Ex. 212 at 14-20, 28-29), Perry hired a police officer to help guard the access gate to the GES contract vote, which took place approximately one week later. As Deamicis, Flaherty, and others testified, the presence of a police officer at a union event was novel, (IRB Tr. at 115, 145, 41), and the police officer participated in denying union members access to the GES vote at Perry's direction (*see id.* at 43, 63). The GES contract passed. (Ex. 209 at 5). Perry also arranged for the final Freeman vote to occur on a weekday, during working hours, at a different union hall, which was inconvenient for union members at that time of day. (IRB Tr. at 44-45, 66-67; Ex. 209 at 6). In those circumstances, after having been rejected twice, the Freeman contract was ratified. (Ex. 209 at 5-6).

2. Substantial Evidence Supports the Conclusion That Deamicis Knowingly Worked With Perry Selectively to Enforce Perry's Voter Eligibility Rules

Next, witness testimony at the IRB hearing showed that Deamicis worked with Perry at the GES vote to determine which union members would be permitted access to the union hall where the GES vote occurred.

Local 82 member Paul McManus testified at the IRB hearing that he openly opposed removal of the 2003 language from the proposed 2009 contracts. (IRB Tr. at 28). McManus made his views clear at a union meeting run by Perry immediately prior to the second vote on the Freeman contract. (*Id.* at 32-33). McManus confirmed that union members on Freeman's seniority list (which included himself) and spares who spent the majority of their time working for Freeman were permitted to vote on the contract during the second vote and that the contract was turned down. (*Id.* at 33). Following the vote, Perry called McManus a coward because he had recommended to union members that they reject the contract. (*Id.* at 33-34). Flaherty accused him, in the presence of the union members, of "ruining people's livelihood." (*Id.* at 35).

At the request of GES members, McManus also attempted to attend the GES vote, which occurred approximately one week later, on April 26, 2012. (*Id.* at 35-36; *see also* 48-49). Upon his arrival, McManus observed Deamicis and a police officer at the gate controlling access to the vote. (*Id.* at 37). Deamicis told him that "he had to see if [McManus] was going to be allowed to attend the meeting" and that "he was going to go check with Mr. Perry "because "some people weren't being allowed into the meeting because they . . . voted on the Freeman contract." (*Id.* at 38-39). Deamicis then came back out with Perry, who confirmed that he could not enter. (*Id.* at 39; *see also* Ex. 210 at 32).

Local 82 member William MacDonald substantially confirmed McManus's testimony, including that McManus had spoken against the proposed Freeman contract (IRB Tr. at 60-61) and was in favor of maintaining the 2003 language (*id.* at 62-63). In addition, MacDonald explained that when he arrived at the GES vote, he observed a police officer not letting members past the gate and heard Deamicis tell McManus that he could not come in "because John [Perry] said so." (*Id.* at 63-64). Indeed, Deamicis admitted during his IRB testimony that he, in consultation with Perry, refused McManus entry to the union hall. (IRB Tr. at 79, 98, 106). MacDonald himself was also refused entry to the vote. (IRB Tr. at 63-64; Ex. 210 at 32; Ex. 229).

Deamicis's own admissions provide further reliable evidence of his active and knowing participation in the scheme. Deamicis testified that he attended the second and third Freeman ratification votes, the GES vote, and the Champion vote that resulted in the acceptance of that contract. (IRB Tr. at 110-112; *see also id.* at 77-78; Ex. 300 at 136). Tellingly, during the GES vote, he told a member that the member could not enter the union hall:

> And I did make a general announcement, standing there with John Perry, when the other gentleman asked me why he couldn't, and I said quote, unquote, 'because John Perry said you couldn't, can't come in.' That was all I said.

(Ex. 300 at 134).

Moreover, at the IRB hearing, Deamicis acknowledged repeatedly on both direct and cross examination that he denied McManus access to the union hall for the GES vote (*see* IRB Tr. at 79, 98, 106; *but see id.* at 89 (claiming no recollection)) and allowed union member James McNiff to vote on the contract (*id.* at 82; *see also* Ex. 300 at 134-35), although he then observed McNiff's being asked to leave the hall (IRB Tr. at 83; *see also* Ex. 300 at 135). In short,

Deamicis admitted working with Perry to deny and allow select union members access to the union hall to vote on the GES contract.

Corroborating all of this evidence are the sworn witness statements of several Local 82 members attesting that Deamicis was involved in denying them access to the union hall at the GES contract vote. (*See* Ex. 227 (Previti statement that Deamicis told him he could not enter the union hall during the GES vote "because John says so"; prior to the vote, Previti filed four grievances alleging violations of the 2003 seniority clause in the Freeman contract); Ex. 230 (Ramos statement that Deamicis "gruffly said no I couldn't go in"); *see also* Exs. 228, 229; *cf.* Exs. 248, 234, 254, 253).[7]

It is firmly established that reliable hearsay is admissible in IBT disciplinary proceedings, *see United States v. Boggia*, 167 F.3d 113, 118 (2d Cir. 1999); *see United States v. IBT ("Wilson, Dickens, Weber")*, 787 F. Supp. 345, 351 (S.D.N.Y. 1992), *aff'd*, 978 F.2d 68, 72 (2d Cir. 1992); *see also Cimino*, 964 F.2d at 1312; *United States v. IBT ("Adelstein")*, 998 F.2d 120, 124 (2d Cir. 1993), and may alone provide sufficient evidence to support a disciplinary decision, *see Boggia*, 167 F.3d at 118-119; *Cimino*, 964 F.2d at 1312. Hearsay gains reliability if hearsay statements corroborate one another or are corroborated by non-hearsay statements or by reliable independent sources. *See Boggia*, 167 F.3d at 118-119; *Wilson, Dickens, Weber*, 787 F. Supp. at 351; *Adelstein*, 998 F.2d at 124. Hearsay also gains reliability when the statements were made under oath. *See Wilson, Dickens, Weber*, 787 F. Supp. at 351; *Cimino*, 964 F.2d at 1312.

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[7] The IBT, in its letter to the Court, expresses concerns with the reliability of the hearsay evidence offered in support of the charges against Deamicis and Flaherty. For the reasons described herein, however, this hearsay evidence is reliable and admissible. In any event, even excluding the specific hearsay evidence the IBT contends is unreliable, it is plain that the IRB's decisions are supported by substantial evidence.

Here, the sworn written statements of witnesses avowing that Deamicus (and as described below, Flaherty) assisted in denying them access to the union hall were largely corroborated by one another and, for several declarants, by their live testimony. *See Cimino*, 964 F.2d at 1312 (hearsay statements reliable where they were made under oath and "paint a consistent picture."). Accordingly, the IRB's reliance upon the sworn written statements in support of its decision was neither arbitrary nor capricious. *See United States v. IBT ("Senese & Talerico")*, 745 F. Supp. 908, 914 (S.D.N.Y. 1990) (counseling that where an objection challenges the admission of hearsay, "[t]his Court's review is limited to assessing whether the determination of reliability by the [IRB] was arbitrary or capricious").

Finally, the IRB was well within its authority to discredit Deamicis's claim that he had no knowledge of the voting rules and thus was not helping selectively to enforce anything, as his testimony on these matters was inconsistent and implausible. For example, while maintaining at the IRB hearing that he "wasn't aware of any rules" (IRB Tr. at 78-79; *see also id.* at 83, 98), Deamicis also admitted that he heard Perry state that the rule was that spares could vote for the company for which they worked the majority of their hours (*id.* at 81) and that he allowed McNiff to vote "[b]ased on my knowledge of [his] working a lot of time with GES" (*id.* at 81-83; *see also* Ex. 300 at 133-134). Indeed, in his sworn testimony at his IRB deposition and the IBT hearing, Deamicis testified that he knew that members could vote on one contract only. (Ex. 54 at 50; Ex. 300 at 133-134).

The IRB was also entitled to reject Deamicis's claimed reason for attending the non-GES votes; namely, that his appointment as a Chief Steward required him to be there. (IRB Tr. at 110-111; Ex. 54 at 56-57; Ex. 300 at 136). Nothing in the duties of a Chief Steward suggests that a physical presence at contract ratification votes was necessary, especially in light of

Deamicis's varying explanations that he simply was concerned with the outcome and "listening to . . . what's going into their contract." (IRB Tr. at 111; *see* Ex. 1 at 12-13, 73; Ex. 54 at 17-18, 56-57; Ex. 300 at 136).

3. Substantial Evidence Supports the Conclusion That Flaherty Knowingly Worked With Perry Selectively to Enforce Perry's Voter Eligibility Rules

Next, substantial evidence also supports Flaherty's knowing involvement with Perry's scheme to ensure passage of the proposed 2009 contracts, including the GES contract. As an initial matter, Flaherty supported Perry's position concerning omission of the 2003 language from the proposed 2009 contracts, as evidenced by, among other things, his public chastisement of McManus at the Freeman vote for expressing an opposing view. (IRB Tr. at 34-35). Perry specifically entrusted Flaherty with enforcing the voter eligibility rules at each of the 2009 contract ratification votes, appointing him to be a sergeant at arms for each vote. (IRB Tr. at 123, 126, 128; Ex. 1 at 54-57; Ex. 19 at 27-30; *see also* Ex. 19 at 14). Indeed, Flaherty confirmed that his duties as a sergeant at arms included signing members into the vote and checking whether the people voting at the particular contract site were so-called "list men" for that employer, since Perry's voting rule mandated that list men could vote only on their particular employer's contract. (IRB Tr. at 123-124; *see also* Ex. 19 at 28-29 (had "common knowledge" of list men, as well as a list of the list men for each employer)). He also admitted that he was tasked to ensure that union members did not vote on more than one contract (IRB Tr. at 125), which he claims to have enforced by reference to the sign-in sheets from previous ratifications (Ex. 19 at 29). While Flaherty denied checking members' dues status to determine eligibility, both Geary and Deamicis testified that Flaherty had a dues roster for this precise purpose, including at the GES vote. (Ex. 11 at 54; Ex. 54 at 54).

As explained below, although Flaherty claims that he performed none of these duties at the GES vote, substantial evidence in the form of sworn member statements, photographs, and testimony reveals otherwise. For example, Local 82 member Greg Mulvey submitted a sworn witness statement avowing that "Tom Flaherty and Joe Burhoe said [to him at the GES vote that] John Perry said we can't let you in." (Ex. 252). Mulvey's sworn statement is corroborated by photographs evidencing his presence and Flaherty's outside of the gate at the GES vote (Ex. 249), McManus's IRB testimony (IRB Tr. at 42-44) and Mulvey's signing of a list containing the names of members claiming they were not permitted to enter the union hall to vote on the GES contract (Ex. 432; IRB Tr. at 39-40). In addition to submitting the photographs described above, IRB member Paul Shoulla avowed in his sworn statement that Perry told him he was "not allowed onto the property" during the GES ratification vote and that he had a "police detail" and that he observed Perry flanked on his left and right by Burhoe and Flaherty. (Ex. 249). Other sworn witness statements and testimony contain similar claims and observations. (*See* Ex. 228; Ex. 234; Ex. 148 at 39-40; *cf.* Ex. 248, 254). Because these hearsay statements are consistent with one another and with live testimony and photographs, they are appropriately considered in support of the IRB's decision. *See Boggia* at 118 (citing cases).

In addition, following passage of the GES contract, Flaherty again was appointed by Perry as a sergeant at arms at the third and final Freeman vote on June 22, 2009. (IRB Tr. at 123-125, 137-138). Flaherty's conduct at this vote further evidences his intent and participation in the scheme selectively to enforce Perry's unauthorized voting rules. Notwithstanding that Flaherty was checking the lists of members who had previously voted (IRB Tr. at 133, 137-138; Ex. 19 at 27-29), ten spares who had voted on the GES contract were also permitted to vote on the Freeman contract, in violation of the policy they were supposedly enforcing. (Ex. 231; Ex.

214; Ex. 217). It was highly unlikely that a mistake was made in permitting any of these spares to vote; at this time, the Local had the sign-in sheet from the GES vote showing exactly who had voted on the GES contract. (Ex. 217; *see also* Ex. 19 at 29). Tellingly, seven of the spares permitted to vote on the Freeman contract had joined the Local after April 1, 2003, and four had known ties to Deamicis and Flaherty. (Ex. 341; Ex. 347; Ex. 366; Ex. 353; Ex. 324; Ex. 356; Ex. 379; Ex. 54 at 8, 10-12; Ex. 19 at 35; Ex. 111 at 17-21).

The IRB was entitled to discredit Flaherty's flat denials of any wrongdoing at the GES vote (*see, e.g.*, IRB Tr. at 127-128, 154-155), in light of the numerous inconsistencies in and implausibility of this testimony. For example, while acknowledging that at Perry's request, he acted as a sergeant at arms at *all* of the 2009 contract ratification votes, including the GES vote, (*id.* at 123, 128), and that his duties as a sergeant at arms included enforcing Perry's voter eligibility rules, manning and reviewing sign-in books, checking that dues were paid, and passing out voting slips (*id.* at 124-125, 149; Ex. 19 at 27-29, 32), Flaherty claimed that he had "no duties" at the GES vote and was "just standing there, yeah, getting sun." (*Id.* at 127; *see also id.* at 128 (although he was a sergeant at arms at the GES vote, he had no functions there), 145 ("no official union duty"), 149). Yet Flaherty could name "no particular reason why" he was standing outside at the contract vote. (*id.* at 129). In addition, while he testified at his IRB deposition that one of his jobs at the third Freeman ratification vote was to compare prior sign in sheets to ensure that a union member did not vote twice (*id.* at 137:7-18), he also claimed that he never stopped anyone from voting twice (*id.* at 143). Based on the evidence, the IRB could logically conclude that it was implausible that while Flaherty was present at each of the votes as a sergeant at arms, manned the gate of the GES vote, and spoke with the union members who were at the

gate and denied entry to the GES vote (*id.* at 155), he neither saw nor heard that anyone was excluded (*id.*).

In sum, the record contains substantial evidence that Deamicis and Flaherty worked with Perry selectively to enforce Perry's unauthorized voting rules on the proposed collective bargaining agreement with GES in order to achieve passage of a contract omitting the 2003 language. As none of the evidence presented "compel[s]" a contrary conclusion, *Hahs*, 652 F. Supp. 2d at 451-2 (noting IRB decisions cannot be overturned unless evidence compels a contrary conclusion), the IRB's application is granted as to the selective enforcement charges.

B. Bringing Reproach Upon the IBT By Exercising Rights of Union Membership While Not a Member in Good Standing

That Deamicis exercised rights and benefits of union membership while not a member in good standing is not disputed. Neither Deamicis nor the IBT has formally objected to the IRB's sanctioning of Deamicis for this conduct. However, the IBT, in its submissions to the Court, has expressed concerns with Deamicis's punishment, arguing, among other things, that punishing a suspended union member for engaging in prohibited conduct during the term of his suspension *may* qualify as an unfair labor practice by limiting that member's right to free association in violation of 29 U.S.C. § 158. (*See* Jan. 30 Ltr. Encl. 1 (Ltr. dated Oct. 3, 2011), at 10; Encl. 2 (Ltr. dated June 16, 2011, at 20-22) (no controlling authority)).

As an initial matter the IBT acknowledges that case law, including *NLRB v. Granite State Joint Board* and its progeny, precludes the sanctioning of former union members for conduct taking place *after* they had resigned from the organization. (*See* Jan. 30 Ltr. Encl. 2 at 20 (citing, *inter alia*, *NLRB v. Granite State Joint Bd.*, 409 U.S. 213 (1972) (holding fine imposed against union members who had resigned from union and then returned to work constituted an unfair labor practice because it interfered with employee's right not to be a union member); *Pattern*

Makers League v. NLRB, 473 U.S. 95 (1985) (holding that union could not prevent member from resigning and could not punish him for post-resignation actions without committing unfair labor practice))). Of course, Deamicis had not resigned from the union while he was exercising the rights and benefits of union membership. *See* IBT Const. Art. II, § 2(i) (setting forth resignation procedure). Rather, he was suspended and thus clearly remained a member of the union, albeit one not in good standing. *See* IBT Const. Art. XIX § 1(g). None of the cases cited by the IBT addresses this scenario.

However, contrary to the IBT's suggestion, precedent supports the conclusion that union discipline imposed against a suspended member – as opposed to one who resigns – does not constitute an unfair labor practice. For example, in *United States v. IBT ("Friedman")*, the Court affirmed the IRB's explusion of former IBT Local president, Harold Friedman, from the union after he failed to comply with the terms of his suspension. 838 F. Supp. 800 (S.D.N.Y. 1993). In so doing, the Court emphasized the deteriorating effect such disregard for lawfully imposed punishment had on the sanctioning process and the morale of the membership at large, explaining that "suspension orders must be vigorously enforced, lest the penalties imposed become meaningless exercises in futility." *Friedman*, 838 F. Supp. at 817; *cf. also United States v. IBT ("McNeil")*, 782 F. Supp. 238, 242 (S.D.N.Y. 1992) (affirming that union may punish members for pre-withdrawal conduct).

Unlike the union members disciplined in *Friedman* and the above-cited cases, Deamicis was not a union officer when he engaged in union activities notwithstanding his failure to comply with the terms of previously imposed discipline (as noted by the IBT). However, the Court's logic in these cases is equally applicable. Permitting additional union discipline against a suspended member for engaging in prohibited activities during his suspension supports the

legitimacy of the union disciplinary process. While the IBT presents a slippery-slope argument, envisioning the discipline of suspended members for merely "tendering Union dues… [or] attending Union meetings to which they are invited," the real concern should be what happens if punishments cannot be enforced internally in the first place. (Jan. 30, 2012 Ltr. Encl. 1 at 10).

Moreover, distinguishing Deamicis on the basis that he was not a union officer when he wrongfully engaged in union activities unduly minimizes his level of involvement in Local 82. During his suspension, Deamicis did far more than pay dues, attend union meetings, and vote. He actively and visibly represented Local 82 in a variety of situations. As described *supra*, he participated on a contract negotiating committee, acted as an appointed member of a disciplinary panel, was appointed to the position of Chief Steward on multiple occasions, and helped find and lead the Local's "strike unit." (Ex. 19 at 51.) In performing these functions while suspended, Deamicis publicly undermined the sanctioning process, demonstrating that such punishment would not be equally applied – the very concern expressed by the Court in *Friedman.*

Accordingly, the IRB acted well within its authority in sanctioning Deamicis for exercising rights and benefits of union membership while not a union member in good standing, and its decision is therefore affirmed.

B. Deamicis's Objection to the IRB's Application on the Basis That He Was Represented By Allegedly Conflicted Counsel Is Without Merit

Deamicis raises a single objection to the IRB's application. He argues that his "right to conflict-free counsel" was breached by his counsel's simultaneous representation of several other targets of the Chief Investigator's investigation, including Perry. (Deamicis Ltr. at 2). Deamicis's failure to point to any specific prejudice he suffered as a result of joint representation, over which he exercised complete control, dooms this claim.

In passing the Labor Management Reporting and Disclosure Act ("LMRDA"), Congress mandated that union members facing disciplinary proceedings receive a "full and fair hearing." 29 U.S.C. § 411(a)(5)(C); *see United States v. IBT ("Simpson Subpoenas")*, 870 F. Supp. 557, 561 (S.D.N.Y. 1994). Courts should "intervene in union disciplinary actions under section 101(a)(5) 'only if there has been a breach of fundamental fairness.'" *United States v. IBT ("Kikes")*, No. 88 Civ. 4486 (LAP), 2007 WL 2319129, at *4 (S.D.N.Y. Aug. 9, 2007) (quoting *Carey & Hamilton*, 247 F.3d at 385). To show a breach of fundamental fairness, Deamicis must provide more than "mere speculation and conclusions" of conflict. *Id.* at *5. Rather, this Court has required a showing of actual prejudice resulting from the allegedly conflicted counsel's representation during the IRB's investigation. *United States v. IBT ("Bane")*, 88 Civ. 4486 (LAP), 2002 WL 654128, at *15 (S.D.N.Y. Apr. 18, 2002). Accordingly, the existence of a conflict or potential conflict, without prejudice, does not justify judicial intervention.

As an initial matter, it is worth noting that Deamicis had full control over who would represent him, if anyone, during the IRB's investigatory phase. At his IRB deposition, Deamicis acknowledged receiving a copy of the IRB Rules, which clearly provide notice of the right to be represented by legal counsel or a member of the International Brotherhood of Teamsters, of the member's choosing, when the IRB takes a sworn in-person examination. *See* IRB Rules ¶ H.3.c. Absent supporting facts, Deamicis's bare claim that he had little choice in refusing Noonan & Noonan as his counsel during the IRB deposition due to the "awe inspiring power" of Perry (Deamicis Ltr. at 6) rings hollow.

In addition, Deamicis has fallen far short of demonstrating any prejudice arising from Noonan & Noonan's representation of him and Perry during his sworn IRB deposition, assuming

that the joint representation was, in fact, a conflict.[8] He states simply that Perry "cut his deal first" and from there somehow concludes that this "affected Deamicis's and others [sic] ability to cooperate and cut a deal for themselves." (Deamicis Ltr. at 5-6). It is far from clear, however, how Deamicis's conclusion follows from Perry's "sweetheart deal," (IRB Tr. at 19), which was an agreement to resign permanently from the union, never hold IBT membership, and never participate in the affairs of any IBT entity (*see* Dkt. No. 4205).

Importantly, even assuming Deamicis was somehow prejudiced by his representation by conflicted counsel during his IRB deposition (there is no evidence he was), Deamicis did have a later opportunity in a full hearing before the IRB, represented by another representative of his choosing, to explain, clarify, or rectify any aspect of his prior deposition. He failed to do so and he did not identify any prejudice or error arising from his deposition during his IRB hearing. These failures bring the facts of Deamicis's case squarely within the ambit of *Bane* and compel rejection of his objection.

Finally, Deamicis's reliance on case law rooted in a criminal defendant's Sixth Amendment Constitutional rights is misplaced. The Sixth Amendment is not applicable here. Indeed, the ramifications of conflicted counsel in civil and criminal cases differ dramatically: where counsel acts improperly to the detriment of a client in a civil case, the client may bring an action and recover the value of the harm arising from the lost claim or defense – here, a lifetime

[8] Deamicis offers only conclusory statements concerning the nature of the supposed conflict arising from Noonan & Noonan's representation of both him and Perry. The main thrust of his argument appears to be that counsel had established connections with Perry and, in his view, Perry received a subjectively better outcome than he did. (*See generally* Deamicis Ltr.). In other words, Deamicis infers the existence of a conflict from his subjective view of the results of the firm's involvement. Deamicis's argument more closely resembles an ineffective assistance of counsel claim. However, much in the way that the judicial system does not consider unfair that a civil litigant is not permitted to retry a case when his counsel chooses a losing legal theory, poor choice or tactic of counsel does not itself create a fundamentally flawed disciplinary proceeding.

ban. In contrast, a criminal defendant cannot sue his or her attorney to obtain freedom from prison.

Accordingly, as Deamicis provides no evidence of prejudice arising from his representation by allegedly conflicted counsel during the investigatory phase of these proceedings, his objection is rejected, and the IRB's Application is upheld.

D. Penalties

Because Deamicis had knowingly violated the terms of a prior suspension, the IRB principally barred him permanently from holding membership in or any position with the IBT. Because Flaherty had no prior record of bringing reproach on his Local, the IRB principally similarly barred him for five years. Each of these penalties represents an allowable judgment in the choice of remedy which the Court does not find unwarranted in law or without justification in fact.

Conclusion

For the foregoing reasons, Application 156 is granted, and the IRB's decision affirmed in all respects.

SO ORDERED.

Dated: New York, New York
February 20, 2012

Loretta A. Preska

LORETTA A. PRESKA,
CHIEF U.S.D.J.