UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -v- INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, et al., Defendants.	:	MEMORANDUM & ORDER 88 CIV. 4486 (DNE)

In re Mr. Barry Feinstein's
Application for Expedited Relief

EDELSTEIN, District Judge:

This opinion emanates from the voluntary settlement in the action commenced by the plaintiffs United States of America (the "Government") against the defendants International Brotherhood of Teamsters (the "IBT") and the IBT's General Executive Board (the "GEB") embodied in the voluntary consent order entered March 14, 1989 (the "Consent Decree"). The remedial provisions in the Consent Decree provided for three Court-appointed officials, the Independent Administrator to oversee the remedial provisions, an Investigations Officer to bring charges against corrupt IBT members, and an Election Officer to oversee the electoral process that culminated in the 1991 election for International Officers (collectively, the "Court Officers"). The goal of the Consent Decree is to rid the IBT of the hideous influence of organized crime through the election and prosecution provisions.

This matter arises out of disciplinary charges brought by the Investigations Officer against Mr. Barry Feinstein ("respondent"), President of IBT Local 237. The Investigations Officer charged Mr. Feinstein with bringing reproach upon the IBT by embezzling and converting union money and property and by illegally receiving interest-free loans. On December 10, 1992, Mr. Feinstein's counsel, Mr. Paul Curran, requested that the Independent Administrator -- Judge Frederick B. Lacey -- recuse himself. The Independent Administrator denied this application. On December 11, 1992, Mr. Curran made a written application to this Court seeking the Independent Administrator's disqualification. This Court denied the application as untimely.

Following this order, Mr. Feinstein and the Investigations Officer reached a settlement of the charges (the "settlement" or "agreement"). Among other things, the settlement called for Mr. Feinstein's suspension as an officer of Local 237 and Joint Council 16 for a period of one year. In addition, Mr. Feinstein was required to pay $65,000 to the general membership of Local 237. After suggesting changes to the proposed settlement and conducting hearings in this matter on December 15, 1992 and December 16, 1992, the Independent Administrator rejected the proposed agreement.

Mr. Feinstein has brought an order to show cause seeking either an expedited hearing and decision on his application to recuse the Independent Administrator and to enforce an agreement with the Investigations Officer, or, in the alternative, a temporary restraining order ("TRO") and preliminary injunction

staying all proceedings pending a decision of this Court. For the reasons stated below, respondent's application for expedited relief, including his request for an order to show cause as well as a temporary restraining order, is denied.

Discussion

Federal Rule of Civil Procedure ("Rule") 65(b)(1) provides that a temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if "it clearly appears from specific facts shown . . . that immediate and irreparable injury, loss, or damage will result." In addition, it is well settled in this Circuit that the standard for a preliminary injunction is a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the movant. See Jackson Dairy, Inc. v. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

Mr. Feinstein is not entitled to a TRO or a preliminary injunction because he has not shown the threat of irreparable injury, let alone that of immediate irreparable injury. Mr. Feinstein's sole asserted basis for finding irreparable injury absent expedited relief is that "[u]nless Mr. Lacey is enjoined from proceeding with the second hearing, Mr. Feinstein will lose forever the primary benefit of the settlement agreement -- the avoidance of further legal proceedings." Respondent's Memorandum

of Law of January 26, 1993, at 24. At most, having to proceed with another set of hearings absent expedited relief is inconvenient. It is axiomatic that the cost of complying with legal proceedings does not constitute irreparable injury. See Hoxworth v. Blinder, Robinson & Co., 903 F.2d 186, 206 (3d Cir. 1990); Northern Arapahoe Tribe v. Hodel, 808 F.2d 741, 747 (10th Cir. 1986).

In addition, Mr. Feinstein has contributed to the protracted nature of these proceedings. It was Mr. Feinstein who attempted to settle the charges. In so doing, he implicitly risked that either the Independent Administrator or this Court would reject the settlement, as has happened on prior occasions in other matters in this case. Nevertheless, Mr. Feinstein chose to proceed with settlement negotiations. When the Independent Administrator convened a hearing to assess the propriety of the settlement, Mr. Feinstein did not balk or object that he desired only one hearing. Rather, Mr. Feinstein attended the hearing, and thus risked that the Independent Administrator would reject the settlement and that he would have to attend further hearings on the merits of the charges. Now that this sequence of events has occurred, Mr. Feinstein contends that it constitutes irreparable injury. On the contrary, the requirement that Mr. Feinstein attend the February 10, 1993 hearing before the Independent Administrator -- prior to being afforded review in this Court -- is a foreseeable consequence of Mr. Feinstein's attempt to settle the charges. Indeed, the proposed settlement expressly states that the "Investigations Officer makes no representation as to any action that may be taken

by the Independent Administrator or the Court with respect to this Agreement. In the event that either the Court or the Independent Administrator does not approve this Agreement, I may elect to proceed with a hearing on the Charges." Respondent's Memorandum of Law of January 26, 1993, Exhibit J, at 4.

Moreover, respondent has demonstrated neither a likelihood of success on the merits nor sufficiently serious questions going to the merits such that the balance of hardships tip decidedly in his favor. Respondent contends that the Independent Administrator acted arbitrarily in rejecting the proposed settlement and that he is entitled to specific enforcement of the agreement. Mr. Feinstein notes that the Independent Administrator rejected the agreement after requesting changes to the proposed settlement and after conducting a hearing in this matter. In so doing, respondent contends that the Independent Administrator acted arbitrarily. While Mr. Feinstein may be unhappy with the result, he has not proffered facts suggesting that it is arbitrary. His argument deconstructs to the contention that, if the Independent Administrator conducts a hearing and suggests changes to a proposed settlement in the hopes of realizing an acceptable agreement, he must approve that settlement. This argument is without merit.

The Consent Decree grants the Independent Administrator sweeping disciplinary authority: The Independent Administrator possesses not only the disciplinary authority of the IBT General President and the GEB, but also the power to review the disciplinary decisions of the GEB. See Consent Decree, §F.12(A).

Moreover, the Second Circuit has shown great deference to the Independent Administrator's decisions concerning imposition of punishment. See United States v. IBT, No. 92-6140, slip opinion, at 19-21 (2d Cir. Dec. 22, 1992). Given the Independent Administrator's broad authority to impose penalties in disciplinary matters, under the Consent Decree and pursuant to Second Circuit rulings, respondent is unlikely ultimately to show that the decision was arbitrary and capricious. Indeed, all that Mr. Feinstein has shown is that the Independent Administrator conducted a careful review of this matter, which included his presiding at a two-day hearing, before rendering a decision. Taking Mr. Feinstein's argument at face value, it would appear that he would have preferred the Independent Administrator to reject the settlement outright, without careful perusal or scrutiny. Regardless of what Mr. Feinstein desires, however, the proposition that Independent Administrator's decision is arbitrary because he engaged in a deliberative review process before rendering a decision is absurd.

Respondent also is unlikely to prevail on the merits of his claim that the Independent Administrator should be disqualified from hearing the dispute under 28 U.S.C. § 455(a) and 28 U.S.C. § 656(a)(2). Mr. Feinstein argues for Judge Lacey's recusal on the grounds that: (1) at a July 30, 1992 hearing before this Court, Judge Lacey accused Mr. Feinstein of attempting to undermine Judge Lacey's authority as Independent Administrator; (2) Judge Lacey's service as Independent Counsel, appointed by the Attorney General

of the United States pursuant to Title 28, Code of Federal Regulations ("CFR"), Part 600, renders it inappropriate for him to address this matter; and (3) Mr. Curran retained Judge Lacey in 1987 to bring a lawsuit on behalf of the University Club, which resulted in Judge Lacey's law firm receiving legal fees of approximately $270,000. In essence, respondent argues that Judge Lacey is either biased against him, otherwise occupied, or biased in his favor.

Mr. Feinstein's reliance on Judge Lacey's comments at the July 30, 1992 hearing is misplaced. This Court's review of Judge Lacey's comments yields the conclusion that they do not indicate hostility or bias against Mr. Feinstein. Moreover, courts generally have denied recusal motions based upon incidents occurring in a judicial setting. See, e.g., In re IBM Corp., 618 F.2d 923, 929 (2d Cir. 1980); King v. United States, 576 F.2d 432, 437 (2d Cir.), cert. denied, 439 U.S. 850 (1978); United States v. Schwartz, 535 F.2d 160, 165 (2d Cir. 1976), cert. denied, 430 U.S. 906 (1977); United States v. Bernstein, 533 F.2d 775, 784-85 (2d Cir.), cert. denied, 429 U.S. 998 (1976). The source of the alleged bias in this case arose during the performance of judicial duties, which suggests that recusal is not appropriate. Even assuming for the sake of argument that Judge Lacey's comments were inappropriate, comments made in connection with one matter do not necessarily preclude his fairly presiding over other matters. See United States v. Roldan-Zapata, 916 F.2d 795, 802 (2d Cir. 1990), cert. denied, 111 S. Ct. 1397 (1991).

Respondent's second ground for recusal is that Judge Lacey's role as Independent Counsel disqualifies him from hearing this matter. As Independent Counsel, Judge Lacey was charged with investigating the conduct of certain Government agencies, including the Central Intelligence Agency and the Department of Justice, in their handling of the Banca Nazionale del Lavoro ("BNL") matter. See Letter from William P. Barr, Attorney General of the United States, to Frederick B. Lacey, Independent Counsel (October 16, 1992) (on file in the Southern District of New York).[1] Mr. Feinstein contends that in this role, Judge Lacey is an employee of the Government, which is a party in this matter against Mr. Feinstein. Respondent avers, therefore, that Judge Lacey cannot act as a neutral adjudicator. This Court has already addressed the issue of whether Judge Lacey's service as Independent Counsel affects his impartiality or compromises the appearance of impartiality concerning his work in this case. This Court held that

> [t]he duties Judge Lacey will perform as Independent Counsel pose no significant threat to his impartiality. In fact, far from promoting a pro-Government bias, the nature of Judge Lacey's assignment may place him in an adversarial posture toward the Government. Judge Lacey is charged with, among other tasks, searching for "improprieties" in the Justice Department's investigation of the BNL matter and investigating "all aspects" of CIA document production in connection with the BNL matter. Letter from William P. Barr, Attorney General of the United States, to Frederick B. Lacey, Independent Counsel

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[1] Respondents conveniently fail to note in their memorandum of law that Judge Lacey no longer serves as Independent Counsel in the BNL matter. Thus, respondent's contention that Judge Lacey's service as Independent Counsel is a basis on which to recuse him is arguably moot.

(October 16, 1992) (on file in the Southern District of New York). In discharging this function, Judge Lacey enjoys "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice." See 28 C.F.R. § 600(a). It would savage credulity to say that Judge Lacey, in the process of investigating and possibly prosecuting those in Government, including employees of the Department of Justice, would lose his impartiality as a member of the IRB and suddenly become predisposed to rule in the Government's favor. Judge Lacey must critically evaluate the Government's conduct, not ratify it.

Furthermore, although appointed by the Attorney General, Judge Lacey is not the Attorney General's clone. Judge Lacey enjoys, as his title suggests, independence from the Government. An Independent Counsel "may be removed from office, other than by impeachment and conviction, only . . . for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the Independent Counsel's duties." 28 C.F.R. § 600.3(a)(1). Even if dismissed, Judge Lacey is entitled to judicial review of the removal decision, and may obtain reinstatement or other appropriate relief. See 28 C.F.R. § 600.3(a)(3). In reality, his sole "ties" to the Government are his appointment by the Attorney General and his use of Department of Justice resources. Having been appointed, his mandate is to uncover wrongdoing within governmental agencies and expose flaws in governmental investigations.

In sum, the position of Independent Counsel requires Judge Lacey not only to be independent of the Government, but also to adopt an adversarial stance toward it. Moreover, Judge Lacey is not an entrenched member of the federal bureaucracy, or employed full-time with the Government, but rather is an individual employed in the private sector who has consented to perform a specific task at the request of the Attorney General. Such temporary service by one not otherwise associated with the Government does not, in this instance, implicate [concerns over partiality]. Thus, the argument that Judge Lacey is technically "within" the Department of Justice or an "inferior officer" of the United States, see In re Sealed Case, 829 F.2d 50, 56 (D.C. Cir. 1987), makes no relevant point . . . . The nature of his role as Independent Counsel, and the tasks he will perform in that capacity, simply do not subvert Judge Lacey's ability to serve as an impartial member of the IRB nor do they create an "intolerable appearance of bias." IRB Rules Opinion, at 83.

November 11, 1992 Opinion & Order, slip opinion, at 6-9 (S.D.N.Y.

1992). Mr. Feinstein has not presented any facts or legal reasoning in his order to show cause that alter the basis of this Court's prior holding. Respondent does engage in a tortured effort to distinguish between Judge Lacey's role as a member of the Independent Review Board, which led to this Court's November 11, 1992 Opinion, and his role as Independent Administrator. In so doing, however, Mr. Feinstein misses the thrust of that Opinion: Judge Lacey's prior service as Independent Counsel created, in regard to this case, neither the appearance of impartiality nor the danger of actual partiality. Accordingly, respondent is unlikely to succeed on his recusal motion based upon Judge Lacey's service as Independent Counsel.

Finally, Mr. Feinstein contends that recusal is appropriate because Mr. Curran was responsible for retaining Judge Lacey in 1987 to bring an action on behalf of the University Club. As a result of this representation, Judge Lacey received legal fees of $270,000. What is most striking about this argument is that respondent never alleges that Judge Lacey represented Mr. Curran or that Mr. Curran paid Judge Lacey's fees. Instead, Mr. Feinstein's entire argument rests on the fact that Mr. Curran procured Judge Lacey's services on behalf of another entity. Such an action, taken over five years ago, is a tenuous basis on which to request recusal. Judge Lacey's one-time representation of an entity associated with respondent's lawyer is not a sufficient basis for recusal. See In re Epps, No. 78 Civ. 4156, slip opinion (S.D.N.Y. July 19, 1979). Indeed, as one court has noted, "[t]he

administration of justice would be significantly impeded if a judge had to disqualify him or herself whenever attorneys appearing before the court have had past dealings with the judge. This is especially the case, as here, when the events in question are remote in time, and unlikely to affect judicial impartiality. Ultimately, the clients pay the price when their attorneys expend their time and effort assembling motions with little factual merit." Venuto v. Witco Corp., No. 89-2841, 1992 U.S. Dist. LEXIS 19277 (D.N.J. Dec. 17, 1992).

It is also worth noting respondent's inconsistent reasoning in support of his recusal argument. Respondent first contends that Judge Lacey's service as Independent Counsel creates an appearance of partiality in favor of the Government; he also asserts that Judge Lacey's past representation of the University Club creates an appearance of partiality in his favor. This Court can only surmise, therefore, that respondent is concerned less with Judge Lacey's impartiality than with finding an adjudicator who will approve the agreement with the Investigations Officer.

Conclusion

For the reasons stated above, Mr. Feinstein has failed to allege specific facts that demonstrate either a danger of immediate irreparable harm or a likelihood of success on the merits. In addition, respondent has failed to raise significant factual issues concerning the merits of this dispute. Thus, Mr. Feinstein has failed to satisfy the test for obtaining expedited relief.

Accordingly, the temporary restraining order and the order to show cause are rejected and returned unsigned.

SO ORDERED

Dated: January 26, 1993
New York, New York
8:55 p.m.

U.S.D.J.