
INVESTIGATIONS OFFICER,

Claimant,

vs.

DENNIS SILVERMAN, MAX SANCHEZ,
STEPHEN SILVERMAN and JOHN
CHAMBERS

Respondents.

DECISION OF
THE INDEPENDENT
ADMINISTRATOR

This matter concerns charges filed by the Investigations Officer, Charles M. Carberry, against Dennis Silverman ("D. Silverman"), Max Sanchez ("Sanchez"), Stephen Silverman ("S. Silverman") and John Chambers ("Chambers") (sometimes referred to as "Respondents"), all of whom are Executive Board members of IBT Local Union 810 in New York City, New York. Having reviewed the evidence and the post-hearing submissions, I find that the Investigations Officer has satisfied his just cause burden of proving the charges against Respondents by a preponderance of the evidence. See United States v. IBT, 745 F. Supp. 333, 337-38 (S.D.N.Y. 1990) ("[T]he Investigations Officer must establish just cause at disciplinary hearings by a fair preponderance of the evidence.").

I. THE CHARGES

The Investigations Officer charged D. Silverman and Sanchez as follows:

You are charged with violating IBT Constitution Article VI, section 4(a), and Article XXII, section 1, by acting in a manner not authorized by local union by-laws, and by

authorizing the expenditure of Local funds pursuant to by-law provisions not approved by the General President; violating Article XXIV, section 24.01 of the by-laws of Local 810 by directing that proceeds of members dues be deposited in trust accounts in unauthorized amounts; violating IBT Constitution Article II, Section 2(a) and Article XIX, Section 7(b)(1) and (2) by violating local union by-laws; and breaching your fiduciary duties to your members, to wit:

On or about 1972, the Board of Local 810, of which you were a member, directed that \$1.00 per month out of the monthly dues of each member be set aside and deposited in the then-existing Local 810 Staff Retirement Plan, of which you were a participant and beneficiary. This conduct and directive were in violation of the by-laws because Section 24.01 of the Constitution and By-Laws of Local 810 authorized a contribution amount of \$0.35 per month per member. Furthermore, at the time these monies were taken, you and your board members knew that a proposed change to the local's by-laws allowing for the increased contribution was not approved by the General President, as required by the IBT Constitution.

On or about September 1987, although the by-law change was still not approved, you took for your own use and for the use and benefit of others the amount of the excess and unauthorized contributions to the Local 810 Staff Retirement Plan when you and your Board members caused the termination and dissolution of the Local 810 Staff Retirement Plan and directed the distribution of nearly \$3,000,000.00 in assets to its participants. More than \$600,000 of these assets originated from unauthorized contributions. As a result of this transaction, you personally received \$561,736.00, a significant portion of which was derived from contributions not authorized by your local's by-laws.

D. Silverman, Sanchez, as well as S. Silverman and Chambers, were also charged as follows:

You are charged with violating Article X, section 10.01-10.03 of the Constitution and by-laws of Local 810 and . . . the IBT Constitution by causing the Local to pay or reimburse the legal expenses of a member in connection with a criminal proceeding resulting in conviction, to wit:

You and your Board members caused the Local to pay, at least, \$7,500.00 for legal fees in connection with the legal representation of an employee, Louis Smith, in a criminal proceeding entitled People of the State of New York v. Louis Smith, Ind. No 5702/87 (Supreme Court, Queens Co.). The proceeding terminated in Mr. Smith's conviction for the felony crime of attempted criminal possession of a weapon in the third degree (Penal Law Section 110/265.02). Mr. Smith was sentenced to an intermittent period of four months imprisonment.

Section 10.02 of Article X of the Local's Constitution and by-laws provide, inter alia, that:

this organization shall pay or reimburse for the payment of all reasonable expenses involved in the defense of . . . criminal proceedings . . . subject to the following conditions . . . (b) If the proceedings be criminal in nature, they must have finally terminated without an adjudication or admission of wrongdoing.

Mr. Smith's proceeding was finally terminated with his admission of criminal conduct and a finding of guilt. Accordingly, payment of his legal fees violated the local's by-laws.

II. THE IBT CONSTITUTIONAL PROVISIONS

The charges against Respondents implicate four provisions of the IBT Constitution. The first is Article XIX, Section 7(b),

which sets forth a non-exhaustive list of grounds for bringing disciplinary charges. That list includes in relevant part:

- (1) Violation of any specific provision of the Constitution, Local Union By-Laws or rules of order, or failure to perform any of the duties specified thereunder.
- (2) Violation of oath of office or of the oath of loyalty to the Local Union and the International Union.

Article II, Section 2(a) is also implicated. This section, which contains the oath of office mentioned in Article XIX, Section 7(b)(2), mandates that all members shall conduct themselves "at all times in such a manner as not to bring reproach upon the Union by violating any specific provision of this Constitution"

The third provision implicated, Article VI, Section 4(a), provides in part that "By-Laws of Local Unions and other subordinate bodies, and amendments thereto, shall be effective upon approval by the General President."

The final provision implicated is Article IX, Section 9(c), which authorizes, in certain circumstances, an IBT Local to pay the legal expenses of "an officer, representative, employee, agent, or one charged with acting in behalf of the Local Union [who] is charged with any violation or violations of any law[,]" provided the local's Executive Board members determine that payment should be made and the general membership approve the payment.

III. THE LOCAL 810 STAFF RETIREMENT PLAN CONTRIBUTIONS

The first charge, relating to the contributions to Local 810's Staff Retirement Plan, implicates only Sanchez and D. Silverman.

A. Background

In 1946, Sanchez organized Local 36 of the Jewelry, Toys and Novelty Workers International Union. T161-18 to 24.¹ When IBT Local 810 was chartered in 1953 (T163-3 to 4), it assumed jurisdiction over Local 36's workers (T161-22). Since its inception, Sanchez has been Vice-President of Local 810. T158-21 to 22. In addition, Sanchez has also served as Secretary for Local 810's Welfare and Pension Funds. T2.20-17 to 24.²

D. Silverman began working at Local 810 as an employee in 1964. T84-16 to 18. At the time, D. Silverman "did some organizational work for several years and then became [a] [B]usiness [A]gent . . ." T84-25 to 88-1. For a short time in 1971, D. Silverman acted as a Trustee for the Local. T85-4 to 5. D. Silverman has served as President of Local since 1972. T82-9 to 10; T85-8. Over the years, D. Silverman has also been Chairman of the Local 810 Executive Board and has served as a "Trustee and

¹ Citations to Volume 1 of the hearing transcript are referred to as "T" and also include both page and references. For example, the reference "T161-18 to 24" refers to page 161 of Volume 1 of the hearing transcript, lines 18 through 24.

² Citations to Volume 2 of the hearing transcript are referred to as "T2." and contain both page and line references. For example, the cite "T2.20-17 to 24" refers to volume 2 of the hearing transcript at page 20, lines 17 to 24.

[A]dministrator of the [Local 810] Welfare Fund and Pension Fund." T86-6 to 11. Local 810 adopted its Constitution and Bylaws in February 1961. R-21.³ On or about May 1, 1961, Local 810's Constitution and Bylaws were submitted to and approved by then IBT General President James R. Hoffa. Id.

Article XXIV, Section 24.01 of Local 810's Constitution and Bylaws provides, in part:

The Executive Board of this Local Union is hereby directed to set aside 35-cents (35¢) per month out of the monthly dues of each member, which sum shall be deposited into a separate trust account for the purpose of providing pensions for officers and employees of the Local Union

R-1 at 33; IO-E at 33.⁴ On May 4, 1961, Local 810's membership unanimously adopted the Trust Indenture Retirement Plan for Officers and Employees of Local 810, I.B.T. ("the Plan" or "Staff Retirement Plan"), which was "drafted in conformity with Section 24.01 of Article XXIV of the [Local's] Constitution and By-Laws" R-8 at §V.

In September 1965, the Martin E. Segal Company ("the Segal Company"), an actuarial firm consulted by Local 810, reported that, because of the increase in the number of individuals employed by Local 810, the .35¢ monthly contribution to the Plan would be insufficient to maintain the Plan's benefits and should be raised

³ Citations to exhibits submitted on behalf of Respondents are indicated by "R" followed by the exhibit number.

⁴ Citations to exhibits submitted by the Investigations Officer are indicated by "IO" followed by the exhibit number.

to approximately .44¢ per member. IO-W at 4; R-9 at 4. On October 31, 1966, Local 810's membership voted to amend Section 24.01 to provide for a .60¢ per month Plan contribution, effective in January of 1967. D. Silverman chaired the meeting at which that amendment was voted upon. R-9a; R-10. See also R-9b.

During a special meeting of Local 810's Executive Board held August 3, 1971, it was noted that the Segal Company had reported that the Plan again needed increased contributions in order to remain properly funded.⁵ R-11 at 2. Thereafter, D. Silverman "proposed that the actuaries be consulted as to the amount of increase required and that an amendment to that effect be submitted to the membership as provided by the Constitution and By-Laws of the Local." Id. In January 1972 the Executive Board approved, upon the motion of Sanchez, a second amendment to Section 24.01 of Local 810's Constitution and Bylaws, increasing the monthly Plan contribution to \$1.00. IO-G at 3; R-12 at 3. The amendment was approved by the general membership on February 17, 1972, at a meeting chaired by D. Silverman. IO-H at 2; R-13 at 2.

These changes in the Local's Constitution and Bylaws, reflecting increases in the contributions to the Plan, were first submitted to the IBT for approval on August 29, 1977, five years after the last increase to \$1.00, when D. Silverman forwarded a revised set of its Constitution and Bylaws to then IBT General

⁵ Respondents were unable to locate any reports regarding the second needed increase. T113-16 to T115-5.

President Frank Fitzsimmons for approval. R-19. The revised Constitution and Bylaws included many changes in addition to the increases in the Plan contributions. The revisions were designed, according to the Respondents, to bring the Constitution and Bylaws up to date. Respondent's Memorandum at 14.

On September 21, 1977, General President Fitzsimmons wrote to D. Silverman, returning the amended Constitution and Bylaws as unapproved. IO-J; R-20. The returned Constitution and Bylaws contained check marks next to sections which needed modification to bring them into compliance with the IBT Constitution. Id. No check marks appeared next to Section 24.01. Id. Local 810 never responded to General President Fitzsimmons' September 21, 1977, letter. R-23.

In 1979, Local 810 submitted a new set of proposed Constitution and Bylaws to General President Fitzsimmons. T120-3 to 8; R-20A. On September 7, 1979, General President Fitzsimmons again wrote to D. Silverman, informing him that corrections needed to be made before the Constitution and Bylaw could be approved. R-20A. As before, no changes to Section 24.01 were indicated (id.) and Local 810 did not respond (R-23).

It was not until August 1984 that Local 810 again contacted the IBT (by letter written by D. Silverman), regarding its Constitution and Bylaws. IO-AA. At the time, D. Silverman simply informed then IBT General President Jackie Presser that the Local was in the process of updating its Constitution and Bylaws. Id.

In 1986 the Plan was terminated, apparently in response to an Internal Revenue Service ruling on pension funds. IO-L at 3; R-26 at 3; T123-21 to T124-16. The Plan's assets were distributed in 1987 to D. Silverman and Sanchez, among others.⁶ T122-5 to 18. Thereafter, a new pension plan for Local 810 employees was established, utilizing the \$1.00 per month membership contribution. T151-17 to T152-14.

In November, 1990, Local 810 again submitted a revised set of its Constitution and Bylaws to the IBT for approval. R-28; R-23. This set of revisions also included the \$1.00 amendment to Section 24.01⁷. Id. Although then IBT General President William McCarthy responded to the submission on January 14, 1991, indicating that further changes needed to be made to the Constitution and Bylaws before they could be approved, he "did not specify that there was any problem with the pension plan provision incorporated in" Section 24.01. R-23.

On May 17, 1991, D. Silverman again wrote to General President McCarthy, requesting specific approval for Section 24.01.⁸ R-22. In his October 7, 1991, letter to D. Silverman, General President

⁶ As a result of this distribution, D. Silverman received \$710,551 and Sanchez received \$561,736. IO-M. The parties agree that approximately \$272,663 of the funds received by D. Silverman and \$215,561 of the funds received by Sanchez were attributable to the two increases in the monthly contribution. IO-N.

⁷ In these revisions, Section 24.01 was renamed as Section 34.

⁸ The Investigations Officer notes that this request was not made until after the investigation of Local 810 had begun. Investigations Officer's Memorandum at 8.

McCarthy specifically approved Section 24.01 after recounting the history of Local 810's bylaws and the proposed amendments. R-23.

The letter noted:

Addressing specifically the issue of the propriety of the 1977 Amendment to Article XXIV, Section 24.01 of the By-Laws, it is my finding that the increase in funding approved by the membership in 1977 should have been approved at that time. Pursuant to the authority vested in this office by Article IV, Section 4 of the International Constitution, I hereby approve Article XXIV, Section 24.01 as it was adopted by the membership in 1977 and submitted to this office on August 29, 1977.

R-23 at 2. This was the first approval by any IBT General President for the amendments to Section 24.01. T139-15 to 22.

B. The Merits of the Charge

The IBT Constitution, Article VI, Section 4(a), requires that "[b]ylaws of Local Unions and other subordinate bodies, and amendments thereto, shall be effective upon approval by the General President." ⁹

At the hearing before me, D. Silverman indicated that he was aware that, in order to be effective, amendments to IBT Local bylaws had to be approved by the IBT General President. T137-23 to T138-10. Sanchez, during his November 20, 1990, deposition before the Investigations Officer, also indicated his knowledge that bylaw amendments needed to be approved by the IBT General President. See IO-Y at 12-13.

⁹ This provision has remained unchanged as far back as the 1957 version of the IBT Constitution. IO-33.

Because Local 810's Constitution and Bylaws expressly provided a specific monetary amount to be contributed to the Plan, .35¢ per month, it became necessary for the Executive Board to formally amend the Constitution and Bylaws each time it wished to increase the contribution amount. To be effective, each time the Constitution and Bylaws were amended, they needed to be expressly approved by the IBT General President. IBT Constitution, Article VI, Section 4(a). Despite these requirements, D. Silverman and Sanchez authorized two contribution increases to the Plan without prior IBT approval of the amendments to the Local's Constitution and Bylaws creating those increases.

In his November 20, 1990, deposition testimony before the Investigations Officer, Sanchez summarized Local 810's attempts to amend its Constitution and Bylaws as follows:

Well, our Constitution and Bylaws, 1961, that's the blue book and we have tried to amend the Constitution bylaws.

We have submitted it to the International, they in turn sent the bylaws back stating that some were okay, some weren't okay. They didn't agree to anything.

We had numerous discussions with the International and as a matter of fact, our attorneys were in touch with them . . . I guess it [the amendments] just got lost in the shuffle.

IO-Y at 11 (emphasis added).

These amendments, however, were not first submitted to the IBT for approval until August 29, 1977, more than five years after the second increase to \$1.00. R-19. Respondents simply ignored the

requirement of IBT Constitution Article VI, Section 4(a), that, to be effective, bylaw amendments must be submitted to the IBT General President for approval.

Respondents argue that the Plan contribution increases were implicitly approved when IBT General Presidents Fitzsimmons and McCarthy returned Local 810's Constitution and Bylaws as unapproved but did not expressly reject the amendments to Section 24.01. Respondents' argument is unpersuasive. The IBT Constitution is clear in its directive that amendments to Local Union Bylaws are effective only upon approval by the General President. General President Fitzsimmons refused to approve the amended Constitution and Bylaws in both 1977 and 1979. In 1990, General President McCarthy again refused to approve the amended Constitution and Bylaws. While the concerns which led General Presidents Fitzsimmons and McCarthy to reject the amended Constitution and Bylaws were with provisions other than the increase in the Plan contributions, the amended Constitution and Bylaws were rejected in whole, not in part. The fact that General Presidents Fitzsimmons and McCarthy were silent as to the proposed amendments to the subject pension cannot be properly interpreted as an approval of that provision. If specific approval was intended, it would have been made clear as it finally was in May of 1991 by General President McCarthy.

Respondents' also argue that General President McCarthy's 1991 express approval of Section 24.01 exculpate them from any

liability. This approval, however, was not obtained until nearly 9 years after the last actual increase. Consequently, such approval does not exonerate Respondents from liability. Cf. Investigations Officer v. Ross, Decision of the Independent Administrator at 16, n. 9 (to be effective, approval must be prior to the performance of the act being approved), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op. (S.D.N.Y. July 14, 1993).

Accordingly, I find that the Investigations Officer met his just cause burden of proof with respect to this charge against D. Silverman and Sanchez.

IV. THE PAYMENT OF LOUIS SMITH'S LEGAL FEES

The second charge, regarding the payment of Louis Smith's legal fees, implicates all four of the Respondents.

A. Background

S. Silverman has been employed with Local 810 for approximately 27 years. T2.31-10 to 12. During the relevant time period, S. Silverman was a member of the Executive Board of Local 810. See IO-L.¹⁰.

Chambers has been employed by Local 810 for 25 years (T2.38-23 to 25) and has been an officer of the Local since 1952 (T2.39-1 to

¹⁰ It is unclear from the record precisely what position S. Silverman held with Local 810. As far back as June 23, 1977, however, S. Silverman was listed as an Executive Board member. See R-16.

6). Chambers, like S. Silverman, was also an Executive Board member during the relevant period.¹¹ See IO-L.

On or about August 25, 1987, Louis Smith ("Smith"), an employee of Local 810, was arrested and charged with the criminal possession of a weapon in the third degree and with the crime of menacing. IO-R. In the complaint it was alleged that Smith had knowingly and unlawfully possessed a loaded firearm and had intentionally placed or attempted to place another individual in fear of imminent serious physical injury by "threatening to blow complainant's head off." Id. Respondents characterize the circumstances surrounding Smith's arrest as follows:

Smith had been on the strike line at VanBourgondien, a company Local 810 was striking. According to usual practice, Smith followed a company truck in route to deliver goods to customers to seek to convince VanBourgondien customers not to do business with them. As Smith and the company truck were stopped at a light, it's [sic] driver got out with a machete and threatened Smith. Smith pulled the pistol and the driver returned to his truck. When the truck reached its destination, the driver complained to the police and Smith was arrested.

Respondents' Memorandum at 18.

Following the charges against Smith, D. Silverman consulted with Local 810's counsel, Sidney Meyer ("Meyer"), as to whether the Local could pay Smith's legal fees. Respondents' Memorandum at 19.

¹¹ Again, it is unclear precisely what position Chambers has held or how long he has been an Executive Board member. However, Chambers was listed as an Executive Board member in the Executive Board meeting minutes dated June 23, 1977. See R-16.

In a memorandum dated August 28, 1987, Meyer informed D. Silverman that the payment of Smith's legal fees was permissible. R-24.

Meyer based his conclusion on the fact that Smith's conduct did not violate 29 U.S.C. § 504, which enumerates charges upon which a person may be disqualified from holding union office. Id. In addition, however, Meyer noted that:

Lastly, the Law permits you to continue to pay [the legal expenses of] any individual until he is convicted of a crime which bars him from office. . . . Obviously, since there is no conviction, this bar does not apply and since the charges alleged do not fall within disqualification, the right to continue payment clearly is there.

Id (emphasis added).

Meyer also recommended that Local 810 solicit outside counsel for a second opinion on the issue. T130-22 to T131-10; R-24. Thereafter, Daniel Markewich, an attorney consulted by Meyer, informed Meyer that Local 810 could pay Smith's legal fees in light of the fact that Smith's conduct was not "a barable offense under 29 U.S.C § 504 . . ." R-25.

On September 17, 1987, Local 810's Executive Board approved the payment of \$7,500.00 to cover Smith's legal fees. IO-L; R-26. Respondents D. Silverman, Sanchez, S. Silverman and Chambers each voted in favor of payment. See IO-L. Chambers, however, stated that he had not seen any legal written opinions on this issue. T2.40-21 to 25. Moreover, Chambers testified that the Executive Board never considered Local 810's Constitution and Bylaws when authorizing payment. IO-FF at 14-15. A check dated July 25, 1988,

in the amount of \$7,554.00 was drafted in favor of Smith's attorneys. IO-S.

On January 19, 1989, Smith pleaded guilty to criminal possession of a weapon in the third degree. IO-R. On April 13, 1989, Smith was sentenced to four months of confinement to be served on the weekends, five years probation and 100 hours of community service. Id.

During a November 15, 1990, Executive Board meeting, it was noted that a total of \$9,726.00¹² had been paid to outside counsel in the Smith matter. R-27. That same day, over nineteen months after Smith was originally convicted, Smith's guilty plea and the expenditure for the legal fees were reported to the membership during the general membership meeting. R-28. The membership approved the expenses at that meeting. Id.

After Smith's conviction, Respondents never attempted to seek reimbursement of the legal fees paid to Smith's attorney. IO-Y at 32.

B. The Merits of the Charges

The Investigations Officer charged D. Silverman, Sanchez, S. Silverman, and Chambers with violating both the IBT Constitution and Local 810's Constitution and Bylaws in authorizing the payment of Smith's legal fees for his defense from charges resulting in a

¹² No explanation was offered as to why this amount differed from the amount of \$7,554.00 paid to Smith's attorneys on July 25, 1988.

criminal conviction. I find that the Investigations Officer has met his just cause burden in proving these charges.

Article IX, Section 9(c), of the IBT Constitution permits an IBT local Executive Board to authorize payment of a member's legal fees incurred in defending a criminal violation, provided the local's membership approve the expenditure.¹³ However, I have previously interpreted Article IX, Section 9(c), to permit such payments only where the local's membership gives prior approval for the payment; the member is exonerated from liability; and payment of the legal fees benefitted the Union. Ross, supra, Decision of the Independent Administrator at 16-23.

Respondents failed to obtain membership approval before Smith's fees were authorized and paid. Indeed, the matter was not brought to the attention of Local 810's membership until November 15, 1990, over three years after the Executive Board first approved payment. R-28.

Respondents suggest that they were not able to obtain membership approval prior to November 15, 1990, because "the vote was taken at the first membership meeting at which there was a quorum after Smith was convicted." Respondents' Memorandum at 22. Respondents also note that "meaningful approval by the membership can only come when the final disposition of the case is known."

¹³ At the time of Respondents' conduct, the 1986 version of the IBT Constitution was in effect. Article IX, Section 9(c) is the same in both versions of the Constitution.

Respondents' Response Memorandum at p. 2 (emphasis in original). This argument, however, is not responsive to the issue.

While it is true that the membership cannot give meaningful approval until after the final disposition of any charges, it is also true that the Local cannot make any payment until after the membership has approved it. Ross, supra, Decision of the Independent Administrator at 16, n. 9 ("the only reasonable interpretation of Article IX, Section 9(c) of the IBT Constitution is that the membership give its prior approval of any expenditure of legal expenses."). As such, Respondents should not have paid Smith's legal fees until the membership was able to give a "meaningful approval," after the final disposition of Smith's case. Id. at 16-17 (Union Officer's argument that there was not opportunity to get prior membership approval for payment of legal fees "d[id] not justify violating the IBT Constitution."). See also United States v. Butler, 954 F.2d 114, 119 (2d Cir. 1992) ("an authorization without full disclosure of material information is obviously a nullity.").

In addition to the approval requirements, it is well settled that "[a] union official may obtain reimbursement of his legal expenses only when his actions enure to the benefit of the Union." United States v. IBT, 970 F.2d 1132, 1138 (2d Cir. 1992). See also Ross, supra, Decision of the Independent Administrator at 19, 23 (payment of legal fees did not benefit the Local and therefore brought reproach upon the IBT).

Respondents assert that, because Smith's "possession of an unlicensed pistol occurred while he was acting in support of the Local Union at a strike," payment of his legal fees was appropriate despite his conviction. Respondents' Memorandum at 29. Respondents' argument is grounded in their assumption that Smith's conduct was not adverse to Local 810.

It is clear that Smith was charged with the possession of an unlicensed handgun. That Smith's conduct occurred during a Union related activity does not redeem his actions. The illegal possession of a handgun, regardless of the circumstances, cannot benefit the Union in any way, can never be condoned, and, in fact, brings reproach upon the IBT. See Investigations Officer v. Ligurotis, Decision of the Independent Administrator at 26-28 (October 27, 1992), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op. (S.D.N.Y. February 9, 1993) (Union officer brought reproach upon Union and was permanently banished for, among other things, possession of a loaded handgun on Union premises in violation of his local's rules).

Moreover, Union members may only have their legal fees paid if they are cleared from wrongdoing. Investigations Officer v. Caldwell, et al., Decision of the Independent Administrator (February 9, 1993) (Union officers permanently barred from holding office for their violation of the IBT Constitution and their Local's Bylaws and their failure to gain membership approval for payment of legal fees for the former officers); United States v.

Local 1804-1, 732 F.Supp 434, 436 (S.D.N.Y. 1990) (Union officers can only be reimbursed by their union for legal fees "if they successfully exonerate themselves from liability."). Because Smith was convicted, his legal fees could not be paid regardless of whether the membership approved payment or whether his actions "benefitted" the Union.

Finally, despite the initial improper payment of legal fees, Respondents had a duty to "take all necessary steps to seek the return" of the legal fees paid on Smith's behalf once it became clear that Smith was not going to be exonerated from the charges. Investigations Officer v. Calagna, Decision of the Independent Administrator at 5 (May 9, 1991), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op. (S.D.N.Y. August 14, 1991). Respondents failed to do this.

Respondents offer the fact that they relied on the advice of counsel in paying Smith's legal fees as a defense to the Investigations Officer's charge. However, Respondents concede that their counsel failed to address the IBT Constitution or Local 810's Constitution and Bylaws. As the Investigations Officer notes, Respondents could not fairly rely on counsel where counsel's opinions failed to address the IBT Constitution or Local 810's Constitution and Bylaws. See Investigations Officer's Reply Memorandum at 8. Moreover, Respondent Chambers testified that Respondents themselves did not consider the IBT Constitution or the Local's Constitution and Bylaws when they voted to approve the

payment of Smith's legal fees. IO-FF at 14-15. Accordingly, I reject Respondents' reliance on the advice of counsel defense.

For the foregoing reasons, it is clear that Respondents violated the IBT Constitution when they authorized and paid Smith's legal fees without approval from the membership and, subsequently, failed to take any action to recover those fees once Smith was convicted. I therefore find that the Investigations Officer met his just cause burden of proving this charge with respect to all four Respondents.¹⁴

V. THE PENALTIES TO BE IMPOSED

A. Pension Fund Contributions

In violation of the IBT Constitution, Respondents D. Silverman and Sanchez amended Section 24.01 of Local 810's Constitution and Bylaws and thus implemented increases in the contributions to the Local's Severance Plan, without approval of the IBT General President.

In mitigation of their actions, however, it is clear that D. Silverman and Sanchez never made any attempt to conceal the increase in the Plan contribution and, in fact, they sought express membership approval each time increases were made. Moreover, IBT General President McCarthy, once he squarely focused on the increases, expressly approved them. Finally, I note the numerous

¹⁴ In light of this finding, I need not address the issue of whether Respondents' conduct also violated Local 810's Constitution and Bylaws.

favorable submissions on behalf of D. Silverman and Sanchez and the testimony which indicated how well the Plan and other Local 810 funds were run by D. Silverman.

In light of the foregoing mitigation factors, I shall impose a three-month suspension on D. Silverman and Sanchez on Charge One. However, given the approval of the Plan increases by both the Local 810 membership and the ultimate approval by the IBT, I will not direct that D. Silverman and Sanchez return the excess funds they received (see supra at 9, n. 6) attributable to the increases in the monthly contribution. Cf. Investigations Officer v. Wells, Decision of the Independent Administrator at 15-16 (August 23, 1991), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), slip op. (S.D.N.Y. April 7, 1992) (Union officer who violated Local's by-laws was nonetheless permitted to retain property transferred to him in lieu of accrued vacation pay where proof of membership approval was provided after the fact).

B. Payment of Smith's Legal Fees

Respondents D. Silverman, Sanchez, S. Silverman and Chambers breached their fiduciary duties to the membership of Local 810 and violated the IBT Constitution when they authorized payment of Smith's legal fees prior to a final and favorable resolution of Smith's charges and prior to any Local membership approval. However, none of the aggravating factors which compelled my permanent debarment of other Union officers previously charged with improper payment of legal fees are present in this case. Cf. Ross,

supra, Decision of the Independent Administrator at 15-26; Caldwell, supra, Decision of the Independent Administrator at 8-14.

Given the foregoing, I hereby suspend Respondents for a period of six months each on this charge. D. Silverman's and Sanchez's three-month suspension on Charge One shall be served consecutively with the six-month suspension imposed on this charge.

C. Order of Suspensions

So as not to disrupt the affairs of the Local, the Respondents shall serve their suspensions in the following order. D. Silverman and Chambers shall begin their suspensions first -- D. Silverman's suspension will last nine months and Chambers' will last six months. Following the termination of Chambers' suspension, the six-month suspension period for S. Silverman shall begin. Following the termination of D. Silverman's nine-month suspension, Sanchez's nine-month suspension shall begin.

During their periods of suspension, Respondents shall remove themselves from their positions with Local 810, and any other IBT-affiliated entity, and shall draw no money or compensation therefrom.

VI. BENEFITS AND LEGAL FEES

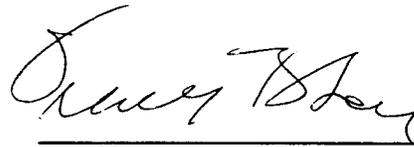
Consistent with my decision in Investigations Officer v. Senese, Decision of the Independent Administrator (July 12, 1990), aff'd, United States v. IBT, 745 F. Supp. 908 (E.D.N.Y. 1990), aff'd, 941 F.2d 1292 (2nd Cir. 1991), and consistent with the Supreme Court's prohibition on the alienation of vested pension benefits in Guidry v. Sheet Metal Workers National Pension Fund,

110 S.Ct 680 (1990), if Respondents are participants in any IBT-affiliated pension, health, welfare or other employee plans, they are entitled to all interest vested up to and including the date of the commencement of their respective periods of suspension. Commencing with their suspensions, however, and continuing throughout the periods of suspension, no further contributions are to be made on Respondents' behalf by the IBT or any IBT-affiliated source to any pension, health, welfare or other employee plan. Respondents are free, of course, to maintain whatever coverage they wish during their suspension through personal contributions.

Finally, given my findings here, Respondents are not entitled to have any portion of their legal fees resulting from this disciplinary action paid by Local 810 or any other IBT-affiliated entity. See e.g., United States v. Local 1804-1, 732 F.Supp. 434, 437 (S.D.N.Y. 1990).

VII. VOLUNTARY STAY

I will stay the imposition of penalties pending Judge Edelstein's review of this Decision, which I will submit to him by way of Application.



Frederick B. Lacey
Independent Administrator

Dated: July 16, 1993