INVESTIGATIONS OFFICER, CLAIMANT, -against- JOHN T. BURKE, JR., HAROLD WOLCHOK, MARIO ABREGO, ROBERT OTTMAN, LANGSTON McKAY, WALTER CAHILL, SAUL BRECHNER, WILLIAM SIMMONS, RESPONDENTS.	:	DECISION OF THE INDEPENDENT ADMINISTRATOR

This matter concerns charges filed by Charles M. Carberry, Investigations Officer, against the following officers of Local Unions 868 and 917 of the International Brotherhood of Teamsters ("IBT") located in New York City, New York:

(1) John T. Burke, Jr. ("Burke"), President of both Local 868 and Local 917;

(2) Harold Wolchok ("Wolchok"), Secretary-Treasurer of both Local 868 and Local 917;

(3) Mario Abrego ("Abrego"), Vice President of Local 917 and a Trustee of Local 868;

(4) Robert Ottman ("Ottman"), Trustee of Local 917 and business agent of Local 868;

(5) Langston McKay ("McKay"), Recording Secretary of Local 917 and business agent for Local 868;

(6) Walter Cahill ("Cahill"), Trustee of both Local 868 and Local 917;

(7) Saul Brechner ("Brechner"), Vice President of Local 868; and,

(8) Walter Simmons ("Simmons"), Trustee of Local 917 and business agent for Local 868.

A hearing was held before me and pre- and post-hearing briefs were submitted by the Investigations Officer and the Respondents.

I. THE CHARGES

The Investigations Officer filed separate charges against each of the Respondents. With the exception of certain additional charges that were filed solely against Respondents Burke and Wolchok (infra, pp. 5-8), the charges against the Respondents are virtually identical.

Based upon the evidence presented to me, I find that the Investigations Officer has met his burden of proving just cause for discipline with respect to each of the charges asserted.

A. The Associate Membership Program Charge

The Investigations Officer alleges that each of the Respondents, as members of the Executive Boards of Local Unions 868 and 917, breached their fiduciary duty to the members of those Local Unions and brought reproach upon the IBT by receiving money and other things of value from the employers of their members and engaging in transactions adverse to the interest of their members.

It was charged that their conduct violated Article II, Section 2(a) and Article XIX, Section 6 of the IBT Constitution.[1]

The charges against each read primarily as follows:

> While an officer of Locals 868 and 917, you brought reproach upon the IBT by entering into agreements with employers of the Locals' members under which sums collected on fees for "associate members" recruited by the employers were paid to the Locals and used by you to increase your salary and that of fellow officers. This conduct was unlawful, in breach of your fiduciary duties to the members of the Locals and in violation of Articles II, Section 2(a) and XIX, Section 6 of the IBT Constitution. To wit:
>
> Beginning on or about July 1986 to the present, you entered into agreements with employers of members of Locals 917 and 868 ("the employers"). By these agreements, you arranged for the non-union employees of the employers to become "associate members" of the Locals.
>
> The Locals never had any contact with these "associate members" prior to their being enrolled by their employers. The employers recruited the associate members for the Local.
>
> Associate members have none of the rights, benefits and privileges of IBT or Local Membership other than participation in the health benefit plan covering the Locals' members. However, as a condition for an employer's non-union employees participation in the plan, all of the employer's non-union workforce had to collectively become associate members. A monthly fee entitled "associate member dues" was paid to the Locals through the employers on behalf of the associate member.

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[1] All references herein are to the 1986 IBT Constitution under which Respondents were charged.

Associate members were not members of the IBT. Their "dues" were calculated by taking the Locals' regular members' dues and subtracting the amount of a member's per capita tax owing to the IBT and Joint Council. The proceeds from associate member fees were deposited into the general funds of Locals 868 and 917.

From 1986 through July 1990, Local 917 collected in excess of $289,000.00 in associate member fees, and Local 868 collected in excess of $435,000.00. The money was used to increase the salaries of board members and business agents. As a result, during the period of 1986 through July 1990, combined salaries for Local 917 increased from $319,000.00 annually to approximately $445,500 and for Local 868 increased from $90,000.00 annually to $171,600.00. The Locals could not have afforded these increases, and the officers could not have received these raises, without the receipt of associate member dues. You had your own salary increased [during the relevant time period].[2] Board members' and

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[2] It was charged that:

> John T. Burke's salary increased from $49,974 in 1986 to $67,413 in 1989 at Local 917 and from $39,166 in 1986 to $57,133 in 1989 at Local 868;
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> Harold Wolchok's salary increased from $49,974 in 1986 to $60,838 in 1989 at Local 917 and from $14,820 in 1986 to $54,183 in 1987 at Local 868;
>
> Mario Abrego's salary increased from $49,974 in 1986 to $60,838 in 1989 at Local 917, and Mr. Abrego became a salaried business agent of Local 868 in 1987 and received an annual salary of $10,400 in 1987 and 1988;
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> Walter Cahill's salary increased from $42,559 in 1986 to $60,838 in 1989 at Local 917, and Mr. Cahill became a salaried business agent of Local 868 in 1987 and received an annual salary of $10,400 for both 1987 and 1988;

(continued...)

> business agents' levels of compensation became dependent upon the employers' continued deposit of these fees and the employers' continued use of this method to provide health insurance for non-union employees. Thus, the increased salaries of the Local employees who negotiated and enforced the collective bargaining agreements with the employers were dependent on these employers inducing the extra income for the Locals from "associate members' dues."

B. The Additional Charges Against Burke

In addition to charging Burke for his alleged misconduct in connection with the associate membership program, the Investigations Officer also asserts two separate charges against Burke relating to payments made to Burke by Local Union 917. The Investigations Officer alleges that:

> Charge #1
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> While an officer of Local 917 [Burke] directly and indirectly obtained from the

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[2](...continued)
William Simmons' salary increased from $40,894 in 1986 to $60,838 in at Local 917 in 1989, and Mr. Simmons became a salaried business agent of Local 868 in 1987 and received an annual salary of $10,400 in 1987 and 1988;

Langston McKay's salary increased from $39,124 in 1986 to $60,838 in 1989 at Local 917, and Mr. McKay became a salaried business agent of Local 868 in 1987 and received an annual salary of $10,400 in 1987 and 1988;

Robert Ottman's salary increased from $23,903 in 1986 to $33,193 in 1989 at Local 917 and from $12,852 in 1986 to $15,600 in 1988 at Local 868; and

Saul Brechner's salary increased from $3,075 in 1986 to $7,967 in 1988 at Local 868, and it is not alleged that Mr. Brechner received any salary at any time from Local 917.

Local an interest free loan, in excess of $2,000.00, in violation of law and in breach of [his] fiduciary duties to the members of Local 917, to wit:

On or about November 10, 1988, [Burke] obtained an advance of $4,309.55 from the Local. This loan was unsecured, interest-free and not memorialized by a promissory note. The indebtedness, which at all relevant times was in excess of $3,298, remained outstanding and unpaid until, or about, December 1989.

Charge #2

While an officer of Local 917, [Burke] embezzled and converted to [his] own use over $6,000 of the funds of Local 917, in violation of IBT Constitution, Article XIX section 6(b)(3), and [his] fiduciary duties to the members of the Local. To wit:

In November 1989, [Burke] owed Local 917 $3,298.00, representing [his] outstanding obligation on a loan from the Local. During, or, about that time, [Burke] took from the Local a payment of $3,298.00. The payment was the proceeds of a retroactive salary increase made in November 1989, retroactive to January 1, 1989. The gross sum of the retroactive payment of the increase was for $6,019.83, the net payment [Burke] received, at that time, was $3,298.00, exactly what [Burke] owed the Local. The payment for the retroactive salary increase, covering work already performed by [him] and for which the Local had fully paid, was a scheme to relieve [Burke] from your debt and was not in the interests of the members.

C. The Additional Charges Against Wolchok

The Investigations Officer, in addition to charging Wolchok with participating in the associate membership program scheme, has asserted three charges against Wolchok in connection with the salary advances to Burke. Wolchok is additionally charged as follows:

Charge #1

While an officer of Local 917 [Wolchok] interfered with the duties of the IBT General Secretary-Treasurer by submitting false and dishonest information in connection with an IBT audit, of Local 917. This conduct was in breach of [Wolchok's] fiduciary duties to the members of [his] Local and brought reproach upon the IBT in violation of Articles II, Section 2(a) of the IBT constitution. To wit:

On or about March 31, 1989, Weldon L. Mathis, General Secretary-Treasurer of the IBT wrote to John T. Burke, Jr., President of Local 917, that an IBT audit of the Local's books showed an advance of salary and allowance to John T. Burke, Jr., in the amount of $4,309.55, made in November 1988, had not been repaid to the Local. On or about April 12, 1989, [Wolchok] represented to the IBT Secretary-Treasurer, inter alia, that "this oversight was paid in full on February 13, 1989." [Wolchok's] representation was false, as [he] knew that Mr. Burke, had not repaid the money.

Charge #2

While an officer of Local 917 [Wolchok] authorized and provided to John T. Burke, Jr. an interest free loan, made from the funds of Local 917, which resulted in a total indebtedness in excess of $2,000.00, in violation of law and in breach of [his] fiduciary duties to the members of Local 917, to wit:

Commencing on or about November 10, 1988, and continuing until about November 1989 [Wolchok] signed checks authorizing advances of salary to Mr. Burke. The initial check was in the amount of $4,309.55, and subsequent checks were in that amount, or in the amounts of $3,798.26 and $3,298.26. The loan was unsecured, interest-free and not memorialized by a promissory note. The indebtedness, which at all relevant time was in excess of $3,298, remained outstanding and unpaid until December 1989.

Charge #3

While an officer of Local 917, [Wolchok] brought reproach upon the IBT and embezzled and converted to the use of another, the funds of Local 917, in violation of IBT Constitution, Article XIX section 6(b)(3), Article II, section 2(a), and [his] fiduciary duties to the members of the Local. To wit:

In November 1989, while on the Executive Board of Local 917, [Wolchok] and other members of the Board authorized a retroactive increase in the salary of John T. Burke, Jr. This resulted in an increase of $6,019.83 for the period of January 1, 1989 until November 1989. The net proceeds and payment of this retroactive increase made at that time was $3,298.00, the exact amount of Mr. Burke's then outstanding indebtedness to the Local. The retroactive salary increase, covering work already performed by Burke and for which the Local had fully paid him, was a scheme to improperly relieve him from his debt and was not in the interests of the members.

II. THE ASSOCIATE MEMBERSHIP PROGRAM

A. Undisputed Facts

At the disciplinary hearing, it was established that Local 917, based in New York, New York, represents gasoline and parking lot attendants, auto mechanics, cleaning services personnel and staff employees working for the United Jewish Appeal ("UJA"). Local Union 868 was organized by the officers of Local 917 and maintains offices at the same location as Local 917. Local 868 represents car salesman, auto dealerships and liquor truck drivers. Tr. 98-104.

The members of both Locals participate in the Local 917 health fund as part of their benefits under their collective

bargaining agreements. The officers and employees of Locals 868 and 917 are also insured by the Local 917 health fund. Tr. 110.

In 1986, Burke and Wolchok became aware that several employers of their members were interested in obtaining health insurance coverage from the Union for owners, managers, supervisors, and other persons that were not part of collective bargaining units. IO-36 at 35, 37-38; IO-37 at 18; Tr. 177.

Wolchok and the other Respondents developed a plan to provide health insurance to non-collective bargaining unit persons through an "associate membership" program. Tr. 117.

B. The Investigations Officer's Arguments On The Alleged Improper Purpose Of The "Associate Membership" Program

In his post-hearing submission, the Investigations Officer asserted that:

> In 1986, Locals 868 and 917 lacked sufficient funds to afford salary increases for Respondents. That year, Respondents Burke and Wolchok learned that several employers of the Locals' members wanted to obtain health insurance coverage for their owners, managers, supervisors and other persons not part of collective bargaining units. IO-36 at 35, 37-38 [Burke]; IO-37 at 18 [Wolchok]; Tr. 177 [Wolchok]. Wolchok, with the approval of the other Respondents, then devised a scheme to bring more money into the Locals by brokering, for a "service fee," the Local 917 Health Fund to these employers. Tr. 117 [Wolchok]. Respondents told employers that they could obtain health insurance from the fund if they organized all of their non-unit persons, including owners and managers, into a group called "associate members." IO-36 at 39 [Burke]. Respondents then required the employer to arrange payment of service fees to the Locals based upon the number of associate members. IO-36 at 39 [Burke]. The service fees paid to the Locals ranged from $10-12 per month for each

> associate member, including those associate members that were owners, managers and supervisors. I0-37 at 18 [Wolchok]; I0-36 at 40 [Burke]; Tr. 177-78 [Wolchok]. Respondents brokered the members' health fund to a number of major Local 917 and 868 employers, including the Metropolitan Garage Board of Trade, the United Jewish Appeal and Kinney Parking of New York. Respondents' insurance business met an early and sustained success, and hundreds of thousands of dollars poured into the Local for raises for themselves. Moreover, as fast as the service fee money was received, Respondents disbursed it to themselves in the form of salary increases and Executive Board fees. Indeed, in 1987 (the first full year where service fees were received), Locals 917 and 868 collected a combined $209,254.00 in service fees. In that same year, Respondents increased their pay by 62%, from combined salaries of $310,944.00 in 1985 (when no associate member fees were collected) to $495,084 in 1987.

In support of his theory that the associate membership program was a scheme to increase Respondents' rate of compensation,[3] the Investigations Officer asserted that:

> The personal benefits to Respondents were substantial. For example, in 1985, the two Locals paid Burke a salary of $77,420.00; in 1987, it was increased

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[3] I have recently been advised that both Locals have passed resolutions stating:

> In order to avoid any suggestion of possible conflicts in the operation of the associate membership program, it shall be the binding policy of this Local Union that no portion of the fees from the Associate Membership Program shall directly or indirectly be used to pay the salaries of the officers of this Local Union.

While this is an implicit acknowledgement by the Respondents that the monies brought in as associate membership fees were used to pay (increase) the salaries of the Local's officers, I have not considered this evidence in making my decision; however, the evidence submitted by the Investigations Officer convincingly demonstrates that Respondents used the associate membership fees solely to increase this own salaries.

> to $115,959.00 (IO-51, 54). Moreover, in 1987, Locals 868 and 917 received $127,316.00 more service fees than in 1986 (IO-57, 58); and in 1987 Respondents paid themselves $128,769.00 more in salaries than in 1986 (IO-51, 54).

In addition, the Investigations Officer submitted minutes of Executive Board meeting to show the alleged personal interest on the part of the Respondents. Those minutes read as follows:

> The Secretary-Treasurer reported that we are still having difficulties with the LIGRA Group and it is always at the point of reduction or at worst complete removal. Be assured that we are doing everything in our power to maintain this income because without it we could not carry on our duties to our members.
>
> The Secretary-Treasurer reported for the period beginning January 1, 1988 to the end of May, 1988, Local 868 has run a deficit of approximately $15,000 or approximately $3,100 per month. Most of this deficit can be attributed to two factors; one, the repayment of Executive Board salaries owed to Executive Board members, which amounts to approximately $10,000+. The second is the continued slow erosion of the Associate fees from LIGRA which is down from a high around $14,000 a month to about $10,000 - $11,000 a month. As always, the only way we can resolve this issue is to increase our organizing efforts both in the traditional mechanism and in associate groups.

IO-46. The Investigations Officer further asserted that between 1986-90, more than $725,037 in "service fees" was paid to Locals 868 and 917 (IO-57, 58), and much of this money was paid by the employers (owners, officers and managers) of the Locals' members. The Investigations Officer points to the associate membership agreement with the Metropolitan Garage Board of Trade as an example. The Board of Trade is an association of employers, and

is management's bargaining agent in the negotiation of collective bargaining agreements for members of Local 917. I0-32. As part of the Board of Trade's Associate Membership Agreement, in 1991, its executive director and seventeen garage owners were themselves associate members of Local 917. I0-60 at 2. These owners and their bargaining representative paid "service fees" to the Local for the privilege of obtaining personal health insurance through the Local 917 Health Fund. Tr. 180-81; I0-60 at 2; I0-33 at section designated "Metropolitan Board of Trade."

Based upon the above, the Investigations Officer contends that the employers had the discretion to terminate the associate membership relationships, and thus cut off the stream of money Respondents were allegedly using for themselves. See I0-32, R-2. Thus, Respondents were beholden to the employers. It is further contended that Respondents knew that they could not earn the increased salaries they had taken unless the employers of their members continued to pay service fees to them. Therefore, the Investigations Officer asserts that Respondents placed themselves in the position where they had a consuming personal interest in transactions with the negotiating adversaries of their members.[4]

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[4] The Investigations Officer asserts that Respondents' relationship with UJA illustrates the conflict of interest caused by collection of service fees. UJA's clerical employees were dues-paying members of Local 917; and UJA had a collective bargaining agreement with the Local. UJA's non-unit personnel were associate members of the Local (the majority of whom were members of management). Compare I0-33 with I0-60 at 8-9. However, in 1991, there were more associate members at UJA than

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C. The Respondents' Defense Of The "Associate Membership" Program

In response to the Investigations Officer's allegations, the Respondents paint an entirely different scenario. They assert that the Investigations Officer incorrectly portrays the associate membership program as an illegal scheme which did not benefit the members of Locals 868 and 917, and that this perspective on the Program ignores its origins, purposes and benefits.

Respondents assert that the associate membership program developed from the Report by the AFL-CIO Committee on the Evolution of Work issued in February of 1985 entitled "The Changing Situation of Workers And Their Unions." R1A. In the chapter headed "Recommendations," the Report provided that "Unions should experiment with new approaches to represent workers and should address new issues of concern to workers." The Report then suggested that:

> [t]he AFL-CIO should undertake a study of providing direct services and benefits to workers outside of a collective bargaining structure. The survey data indicate that a large number of non-union workers desire a

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[4](...continued)
there were actual IBT members within the bargaining unit. Tr. 185. As a result, the local was earning more in service fees from the UJA than in membership dues. Additionally, a member's dues are applied to a wide array of expenses including negotiations, grievances, membership meetings, newsletters, elections, a strike fund, and servicing problems related to benefits. Tr. 187. In the case of associate members, the only service provided was assistance with health benefit claims. IO-37 at 22-23. The Investigations Officer thus asserts that there was a greater proportion of associate member service fees left to apply to Respondents' salaries than with regular members' dues.

> number of employment-related services (such as job training) and fringe benefits (such as supplemental medical insurance) that are not normally available to them. Indeed, 61 percent of non-union workers say that they would be very interested or fairly interested in joining an organization that provides information about job training and job opportunities, and 47 percent of non-union members stated they definitely or probably would join an organization in order to receive certain specified benefits.

R1A. Eighteen months after the initial Report was published, a progress report on the AFL-CIO study was issued, which noted that:

> [t]he benefit program's prompt implementation has caused expeditious consideration of another major departure from traditional concepts of union membership - the associate membership . . . . An associate membership that rests on a combination of an appreciation for the services the union provided under collective bargaining and eligibility for the consumer benefits offers great potential for an enduring relationship with a wide cross-section of the American workforce.

Respondents note that as of the date of the hearing in this case, the IBT had not developed an associate membership program of its own, but had incorporated a payment code for associates on its TITAN system. Tr. 135.

The Respondents assert that the associate membership program was first established with Square Plus Operating Corp. Tr. 117. The subject was discussed with counsel for Local 917, Irving Bush, who researched the issues and drafted the documents setting forth the terms of the Program. Tr. 117-18, 266-71, 278-79; R2, 4. The agreement with Square Plus bound the employer to the Local 917 trust instrument; provided for a specific contribution rate,

including a requirement to pay any increase that occurred during the term; disclaimed specifically that the Union was acting as the "collective bargaining representative" in this connection; and provided for each participant to pay a "service charge" of $12.00 per month. The agreement was for a three-year term, commencing June 1, 1986, and specifically referenced the collective bargaining unit. R2. In drafting this document, counsel sought to assure that "there [would] be complete compliance with Section 302 of the Taft-Hartley law." TR. 268. In addition to a written agreement, a checkoff authorization was included (R4), and counsel advised that the Union should not provide for an associate membership program where there was not an already existing collective bargaining relationship. Tr. 269.

The Local was further advised by counsel that they must take all of the non-union personnel ("If they didn't take everyone, there would be a selective basis for bringing people into the fund, which, as far as I was concerned, is just a substitute for selling insurance." Tr. 270). Counsel also considered the fact that supervisory and managerial employees would be included and the legal implications thereof. Tr. 270-72.

Moreover, the Local required that <u>all</u> non-bargaining unit personnel participate because, based upon Mr. Wolchok's experience on the Board of Directors of Blue Cross and Blue Shield, the Respondents determined that they should not permit "adverse selection," <u>i.e.</u>, employers placing sick employees in the 917

Fund, while negotiating an even lower cost health package with someone else for those employees with good health experience. Tr. 149.

Respondents point out that the agreements for participation in the associate membership program vary in: 1) the benefit packages; 2) contribution rates (depending upon utilization and types of benefits); and 3) the specific provisions negotiated between the Union and the employer. For example, the UJA Agreement (I0 32) is the most lengthy and extensive instrument and was negotiated by counsel for the Union and counsel for UJA. Tr. 127. This agreement also specifically deals with Section 302(c)(5) of Taft-Hartley (also referred to herein as "Labor Management Relations Act" or "LMRA") in the preamble.

Respondents demonstrated that all of the associate membership agreements are entered into only with employers that have a current collective bargaining agreement with the unions. Tr. 130, 133. The employers never contribute less for the associate members than for the bargaining unit union members. Tr. 131.

Respondents also claim that the associate membership program has consistently been discussed with the membership over the years at Local 868 and Local 917 meetings without objection from any source. Tr. 153. Mr. Wolchok testified that when he discussed the program with the bargaining unit at UJA, "the bargaining unit basically said to us make sure they are paying

something because we are paying dues and I said in our program that's exactly how it works and we then effectuated that document that you have." Tr. 127.

Mr. Wolchok "checked with Mr. Bush" about the propriety of allowing individuals who negotiated contracts with the Local to hold associate memberships. Mr. Wolchok was advised that the issue had been considered in devising the program and that Mr. Bush, as counsel, did not view that situation as a violation of the Labor Management Relations Act. Tr. 142, 272. However, Mr. Wolchok preferred to be on "the conservative side" and removed all persons that had labor relations responsibilities from the program. Tr. 142, 175-76, 255. Approximately 24 to 30 individuals were eliminated and all service fees paid for the month of November 1990 were refunded. Tr. 255.

D. Conclusion

While the Respondents have made many arguments on the propriety of the associate membership program, they failed to rebut the central conclusion urged by the Investigations Officer -- that the associate membership program was conceived solely as a means to enrich the individual Respondents. The evidence submitted by the Investigations Officer demonstrates that there was an almost dollar-for-dollar correlation between increasing associate member fees and salary increases taken by the Respondents. The Respondents do not even attempt to rebut this evidence or show that the associate membership program was used for anything other than

their own enrichment. In fact, Respondents entire argument was based upon their justifications for holding their own pecuniary interests above those of their members. The financial condition of the Locals was not improved, the money was not added to the coffers of the Locals, there were no funds dedicated to new organizing efforts or an improvement of Locals' facilities or operating procedures, and the money was not used to benefit Local 868's or 917's members in any way.[5] In short, the Respondents abused their trusted positions as Union officers to further a scheme which was designed with only one purpose in mind -- to further their own individual financial interest. As such, the Respondents brought "reproach upon the Union." IBT Constitution (1986), Article II, Sec. 2(a); Article XIX, Sec. 6.

III. THE ADDITIONAL CHARGES AGAINST BURKE AND WOLCHOK

The Investigations Officer has asserted charges against Respondents Burke and Wolchok independent of the associate membership program charge. These charges all relate to salary

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[5] The Investigations Officer urges me to find that the operation of the Associate Membership Program was a per se violation of Section 302 of the Labor Management Relations Act (29 U.S.C. 186). I decline to so hold, as the collection of fees does not, in and of itself, violate the statute. See e.g. Schwartz v. Associated Musicians, 340 F.2d 288 (2d Cir. 1964); Grajczyk v. Douglas Aircraft Co., 210 F.Supp 702 (S.D. Ca. 1962). However, given my finding in this case that the Investigations Officer has met his just cause burden of proving the charges involving this associate membership program, it is clear that such a program is subject to abuses without proper controls and oversight. I therefore suggest that the IBT develop a regulatory framework and guidelines for associate membership programs to ensure that the proceeds derived from such programs are utilized in the best interests of the rank-and-file membership.

advances received by Burke from Local 917. Burke and Wolchok are both charged with violating their fiduciary duties to the members of Local 917 by providing Burke with a loan from the Local 917 in excess of $2,000. Burke and Wolchok are also charged with embezzlement from Local 917 with respect to a retroactive salary increase that was utilized to satisfy the outstanding salary advance owed by Burke to the Local.

Finally, Wolchok alone is charged with making false representations to the IBT in response to inquiries to the Local regarding Burke's salary advance. As set forth below, I find that the Investigations Officer has met his burden of just cause with respect to the these additional charges.

A. The Salary Advance Charges

Burke and Wolchok concede that Burke accepted salary advances from Local 917 in excess of $2,000, and that he owed the money from November 1988 through December 1989. They also do not dispute that they both signed the checks that represented the salary advances. 29 U.S.C. Section 503(a) provides:

> No labor organization shall make directly or indirectly any loan or loans to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of $2,000.

29 U.S.C. Section 503(a).

Since there is no dispute that Burke's total indebtedness was in excess of $2,000, the only question is whether the salary advance was a loan. Black's Law Dictionary defines a loan as:

> Delivery by one party to and receipt by another party of a sum of money, upon agreement, express or implied, to repay it with or without interest.

Black's Law Dictionary, 6th Ed. (1991). Here, monies were delivered by the Local to Burke, who received and accepted the money, with, at a minimum, an implicit agreement to repay the Local. Thus, there can be no question here that Burke and Wolchok arranged for Burke to receive a loan in violation of the federal statute and their fiduciary duties to the members.[6]

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[6] The Investigations Officer also asserts that the conduct of Burke and Wolchok violates section 723 of the New York Labor and Management Improper Practices Act which provides, in part:

> 1. Without limiting his fiduciary obligation provided in section seven hundred twenty-two, it shall constitute a violation of his fiduciary obligation for an officer or agent of a labor organization . . .
>
> (f) To lend any funds of the labor organization, directly or indirectly, to either any officer, agent, or employee of such organization . . . provided, however, that loans may be made from a loan fund which has been set aside in accordance with a written resolution of the governing board of the labor organization for the specific purpose of making personal loans to its officers, agents and employees generally, in compliance with established written rules.

N.Y. Exec. Law 723 (McKinneys 1988). However, in view of my decision on the federal statutory basis for the charge, it is unnecessary for me to address the New York state statute.

Respondents Burke and Wolchok argue that Section 503 requires that the violation be willful and that the Investigations Officer failed to establish that these were willful violations because Burke and Wolchok did not "know" the salary advance was a "loan."[7] However, Respondents' argument misses the point. The willfulness of Respondents' conduct lies not in whether they willfully violated the statute, but whether they willfully engaged in conduct that violated the statute.[8]

Respondents argue that Mr. Wolchok consulted with counsel for the Local Union, who indicated that the by-laws of the Local

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[7] Respondents' assertion that they did not consider the salary advance a loan is not credible. In Local 917's 1988 annual LM-2, the advance to Burke is listed as a general obligation loan receivable, to be repaid in January, 1989. This LM-2 was signed by both Burke and Wolchok, with the certification that they had examined the report and that the report was, to their knowledge, "true, correct and complete." Thus, Respondents contention that they did not know this was a loan must be rejected.

[8] In addition, the Investigations Officer correctly points out that Mr. Wolchok was at least aware of Section 503's prohibition of loans in excess of $2,000. His testimony that he was not aware that a salary advance constituted a loan is incredible, particularly in light of his responsibility for the LM-2 filings and his quite extraordinary educational and professional accomplishments. Mr. Wolchok holds a Bachelor of Arts in labor economics, a Master of Arts in education, and has 30 credits beyond his Masters in labor economics. He was a Professor of Economics at New York City Technical College, has written two books on labor relations in the United States, the Soviet Union and China, and was designated by the United States Department of State to assist the Chinese in developing labor relations policies. It is difficult to imagine that anyone with this extensive and global background in economics and labor would harbor any doubt that a salary advance was a loan.

Union specifically authorized advances on salary and vacation.[9] Thus, Burke and Wolchok argue that they were relying on the advice of counsel, and thus cannot be found to have violated Section 503. However, Respondents' reliance on the advice of counsel must be reasonable. See e.g. Investigations Officer v. Coli, Decision of the Independent Administrator at p. 14 (May 15, 1992), aff'd, United States v. IBT, 88 Civ. 4486 (DNE), Slip. Op. (S.D.N.Y. July 14, 1992); Investigations Officer v. Sansone, Decision of the Independent Administrator at p. 15 (March 26, 1992), aff'd United States v. IBT, 88 Civ. 4486 (DNE) Slip. Op. (S.D.N.Y. May 15, 1992).

In this case it was not. First, the Bylaws state that advances are permissible "to the extent allowed by law." Here, this advance was not "allowed by law" and Respondents knew or should have known of the prohibition. Second, there must be an "opinion" of counsel to rely on. The testimony that counsel for the Local merely pointed Respondents to the Bylaws, without

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[9] I have recently been advised that both Locals passed a resolution banning salary advances of any amount. The resolution reads:

> Although the Bylaws allow for salary advances, it shall be the binding policy of this Local Union that salary advances, regardless of the amount, shall not be approved or permitted by any officer, individually, of this Local Union or by the Executive Board.

While not considered by me in relation to Respondents' liability for this charge, the passage of the Resolution has been considered by me as a mitigating factor in imposing punishment.

offering an opinion, is uncontroverted. A passing reference to the Bylaws on a matter involving union funds entrusted to Respondents as fiduciaries cannot vitiate Respondents' culpability for violating Section 503.

B. The Embezzlement Charges

The Investigations Officer charged Burke with embezzlement of $6,019.83 involving a salary increase that was approved on November 15, 1989, at the regular Executive Board meeting of Local 917 and made retroactive to January 1, 1989. Wolchok is also charged with embezzlement for having authorized this retroactive increase.

The IBT Constitution prohibits embezzlement or conversion of union funds. IBT Const. Art. XIX, Section 6(b)(3). See also 29 U.S.C. 501(c). To sustain a charge of embezzlement, the Investigations Officer must prove that Burke and Wolchok acted with fraudulent intent to deprive Local 917 of its funds. Investigations Officer v. Morris and McNeil, Decision of Administrator at 13 dated May 22, 1991, aff'd United States v. IBT (App. XXXVII), 88 Civ. 4486 (DNE), slip. op. (S.D.N.Y. October 9, 1991). See also United States v. Welch, 728 F.2d 1113, 1118 (8th Cir. 1984).

The Investigations Officer asserts that Burke and Wolchok acted with fraudulent intent to deprive the Local of its funds in that: (1) they failed to disclose at the Executive Board meeting and to the members, at the time the retroactive salary increase was

given to Burke, that Burke owed the Local money; (2) the net amount of the retroactive payment was the precise amount of Burke's outstanding debt; (3) the debt itself was illegal; (4) they had earlier concealed the loan from the IBT General Secretary-Treasurer; (5) the loan was only fully paid after Burke received the raise; and (6) Burke was already fully compensated for the work performed during the retroactive period.

Thus, I find that the Investigations Officer has proven by a fair preponderance of the evidence that Respondents Burke and Wolchok acted with the requisite fraudulent intent to deprive Local 917 of its funds. Accordingly, there is just cause to find that Mr. Burke and Mr. Wolchok possessed the requisite fraudulent intent to deprive Local 917 of its funds.

C. The Statements By Wolchok

Article X, Section 10 of the IBT Constitution authorizes the General Secretary-Treasurer to audit the books of Local Unions. The Article makes interference with the authority of the General Secretary-Treasurer a basis for discipline under Article XIX. In this case, General Secretary-Treasurer Mathis, pursuant to his constitutional authority, audited the books of Local 917, and made an inquiry concerning Burke's salary advance. Wolchok is charged with breaching his fiduciary duty and bringing reproach upon the IBT by his response to an inquiry concerning the salary advance paid to Respondent Burke in November, 1988. In short, the Investigations Officer accuses Mr. Wolchok of misrepresentations of

fact in his response to the inquiry from the International Union. The circumstances here support the contention that Wolchok intended to deceive.

When the International's Auditor discovered that the salary advance issued in November was "outstanding," he was told by Respondent Ottman that it was repaid. TR 248. When the Auditor asked for verification, Ottman checked and discovered that it had not been repaid. TR 248. Ottman advised the Auditor and then advised Burke of the discrepancy, who paid the deficiency the next day. However, this repayment was illusory, as an advance to Burke remained outstanding until the Executive Board approved his retroactive salary increase on November 15, 1989. Thus, while Burke may have repaid some of what was owed to the Local, there was, continuously, at least one month's salary advance due and owing until November. Wolchok knew this in February 1989 when he advised the IBT's General Secretary-Treasurer that Burke's advance was "paid in full."

Thus, the Investigations Officer has met his burden of just cause in proving that Respondent Wolchok willfully or intentionally sought to misrepresent the facts.

IV. SUMMARY

Based upon the foregoing, I find that the Investigations Officer has met his burden of establishing just cause for discipline with respect to the associate membership program charges against each Respondent. In addition, I find that the

Investigations Officer has met his burden of establishing just cause for finding Burke and Wolchok brought reproach upon the IBT by violating their fiduciary duty to the membership in the provision of the loans, in the form of salary advances, to Burke, in excess of $2,000 and with respect to the embezzlement charges against Respondents Burke and Wolchok.

Finally, the Investigations Officer has met his burden with respect to the charge against Wolchok relating to the provision of false information.

V. PENALTY

The Respondents each breached their fiduciary duty owed to the membership in executing the associate membership program scheme solely to enrich themselves in the form of salary increases. In addition, Burke and Wolchok breached the fiduciary duty that they owed to the membership as officers in providing illegal loans to Burke that they knew or should have known violated federal law, as well as participating in the embezzlement of the Local's funds. Finally, Wolchok brought reproach upon the IBT by his false and misleading statements to the IBT in connection with the inquiry on Burke's salary advance. In imposing the penalty herein, I acknowledge the contributions that all Respondents have made to the both Local 917 and Local 868. I also acknowledge their recent attempts to address certain of the issues raised by the Investigations Officer. This demonstrates their acceptance of

responsibility for their conduct in office, and was a substantial mitigating factor in imposing the penalty here.

As to Respondent Burke, he has been the President and principal officer of both Local 917 and Local 868 since 1976. He has been a member of Local 917 for over 25 years and a member of Local 868 for over 16 years. Mr. Burke does not have a criminal record nor has he ever taken the Fifth Amendment. He is highly regarded within the Union and the membership apparently has great confidence in his leadership.

Respondent Wolchok has been Secretary-Treasurer of Local 917 for 25 years and Secretary-Treasurer of Local 868 for approximately five years. He has been a member of Local 917 for nearly 40 years and joined Local 868 approximately 15 years ago. He has an extraordinary educational and professional background that includes publications on labor relations and teaching at New York City Technical College. Mr. Wolchok, likewise, has no criminal record and has never taken the Fifth Amendment.

The other Respondents likewise have no prior record of improper conduct either within or without the IBT, and, other than the charges here, have apparently discharged their obligations as officers of the Local.

Notwithstanding the positions held by all Respondents in their community and their history of service to the Union, a Local's executive officers, acting in trust for its members, have a heightened responsibility to take special care when handling the

Local's funds. See, e.g., Investigations Officer v. Morris and McNeil, Decision of the Independent Administrator at p. 26 (June 14, 1991) ("Officers of Local Unions must understand that their Local Union coffers are not their personal piggy banks that can be cracked open whenever it serves their personal benefit. The Local's assets belong to the Local's members. The Local's officers are mere trustees of those assets."), aff'd, United States v. IBT, 777 F. Supp. 1123 (S.D.N.Y. 1991), aff'd, Nos. 92-6056, 92-6058, 92-6088, slip op. (2d Cir., September 15, 1992). Burke and Wolchok breached this fiduciary obligation.

Taking into consideration the seriousness of the wrongdoing by the Respondents as well as the mitigating factors listed above, I impose upon Respondents a period of suspension from the IBT of 2 years.[10] This means that for a period of 2 years, Respondents are to remove themselves from all IBT-affiliated Union positions (including, of course, membership in the IBT) and draw no money or compensation therefrom, or from any other IBT-affiliated source.

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[10] Respondents' counsel has informed me that Mr. Burke has repaid the retroactive salary increase to the Local, including interest for a total of $9,019.83. As I have found that the Investigations Officer has met his burden of just cause on the embezzlement charge, I did intend to require Mr. Burke to restore these funds to the Local as a condition of the restoration of his membership after the initial suspension. In view of his action, there is no need for such an Order, and his voluntary payment has been considered by me as a mitigating factor in imposing the penalty here.

After this 2 year suspension expires, Respondents may resume their membership, but shall be disqualified for an additional two years from holding any IBT-affiliated Union positions such as Executive Board or trustee positions.

VI. SANCTIONS ON BENEFITS

My authority to impose sanctions on the employee benefits of Respondents is now well settled. See Investigations Officer v. Senese, et al., Supplemental Decision of the Independent Administrator (November 29, 1990), aff'd, United States v. IBT, 753 F. Supp. 1181 (S.D.N.Y. 1990), aff'd 941 F.2d 1292 (2d Cir. 1991).

Consistent with my ruling in Senese, I will not alienate any vested benefits of Respondents. See also Guidry v. Sheet Metal Workers National Pension Fund, 1210 S. Ct. 680 (1990). However, any contributions made by any IBT-affiliated entity to sustain benefits on behalf of Respondents as a result of their serving as an officer or trustee of any IBT-affiliated entity must cease, to be effective during the term of their suspension. Included in this suspension of benefits would be any automobile or other allowances. Respondents may, if they wish, use their personal funds to continue any particular benefits. Finally, given my finding here, none of the Respondents are entitled to have their legal expenses paid by the Local. 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 these penalties pending a review of this decision by Judge Edelstein, which I will submit to him by way of Application.

Frederick B. Lacey
Independent Administrator

Dated: 10/1/92