UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	88 Civ. 4486 (LAP)
Plaintiff,	ORDER
- v. -	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,	IRB APPLICATION 162
Defendants.	

LORETTA A. PRESKA, Chief United States District Judge:

On August 29, 2011, based upon charges recommended by the Independent Review Board (the "IRB"), the International Brotherhood of Teamsters (the "IBT") found that IBT Local 630 ("Local 630" or the "Local") Secretary-Treasurer Paul A. Kenny ("Kenny") and Local 630 business agents Abraham Moreno ("Moreno") and Gary Guillory ("Guillory") breached their fiduciary duties and embezzled Local 630 funds. The charges were based upon large bills from restaurants in the Los Angeles area that Kenny, Moreno, and Guillory had expensed to the Local. At these meals, only Local 630 employees and officers were present and large amounts of alcohol were purchased. The evidence included records from the restaurants giving the details of the items ordered and the times at which the purchases took place. On September 21, 2011, the IRB found the IBT's findings of embezzlement and breaches of fiduciary duties not inadequate.

The instant application was submitted to the Court on August 23, 2012. In that application, the IRB requests an order affirming the IRB's finding that the IBT decision regarding Kenny, Moreno, and Guillory was not inadequate.[1] For the reasons that follow, that request is GRANTED.

I. BACKGROUND

A. Facts

Kenny joined the IBT in 1981. (IBT Decision dated Aug. 29, 2011 ("IBT Decision") Ex. F to Application 162, at 2.) In 2004, Kenny became the Local's Secretary-Treasurer. (Id.) The Secretary-Treasurer is the Local's highest ranking officer. (Id.) Moreno joined the IBT in 1986 and was appointed as a Business Agent in 2007. (Id.) Guillory joined the IBT in 1975 and was appointed as a Business Agent in 2007. (Id.)

Section 9(A)(4) of the Local's bylaws required that the Local's Secretary-Treasurer and President to co-sign checks issued by the Local. (Ex. 305 to May 12, 2011 Charge Report.)

[1] Although the Consent Decree contains no express procedure by which a union member disciplined by an IBT entity on IRB-recommended charges may appeal such a "not inadequate" determination to this Court, the IRB has followed a practice of facilitating judicial review of its "not inadequate" determinations by submitting applications such as the instant application when a charged party demonstrates an intention to seek judicial review of a "not inadequate" finding. See United States v. IBT ("Hahs"), 652 F. Supp. 2d 447, 451 (S.D.N.Y. 2009) (collecting cases).

Additionally, the Local's bylaws provided that the "Secretary-Treasurer in conjunction with the President, shall be the authority to disburse or order the disbursement of all monies necessary to pay the bills, obligations, and indebtedness of the Local [], which have been properly incurred as provided herein." (Id.) Despite this, on May 31, 2007, the Local's Executive Board voted to make Kenny "the sole person" whose permission was required "for disbursement of all monies necessary to pay the bills . . . ." (Ex. 306 to May 12, 2011 Charge Report.)

In February 2009, Louis S. Baniecki ("Baniecki"), an IBT auditor, performed an audit of the Local for the period January 1, 2005 through December 31, 2008. Thereafter, Baniecki met with the Local's Executive Board to discuss his findings. Among other things, Baniecki advised the Executive Board on policies related to meals paid for by the Local. (Ex. 195 to May 12, 2011 Charge Report at 9-14.) Baniecki instructed that "in-town meals are not allowed with only one employee of the Local present" and that the Local should "restrict in-town meals with only [Executive Board] members or employees of the Local present." (Id. at 10.) He continued "[w]e do not allow in-town meals with executive members or employees of the Local present except on rare occasions . . . . [o]nce in a blue moon." (Id.) Baniecki also raised the issue that many of the meal receipts he reviewed during his audit violated IBT policy because they

evidenced use of the Local's funds for in-town meals consumed by groups consisting exclusively of Executive Board members or employees of the Local. (Id. at 14.) By letter to Kenny dated May 19, 2009, C. Thomas Keegel, General Secretary-Treasurer of the IBT, documented Baniecki's instructions. (Ex. 197 to May 12, 2011 Charge Report at 2.)

Between January 2007 and October 2010, Kenney caused Local 630 to pay for at least 668 charges made at restaurants in the Los Angeles area. (IBT Decision at 3.) These charges, which had no proper union purpose, totaled approximately $168,168. (Id.) Between January 2008 and October 2010, Moreno caused the Local to pay for 119 charges totaling approximately $39,595 made at restaurants in the Los Angeles area. (Id.) Between January 2008 and October 2010, Guillory caused the Local to pay for 109 charges totaling approximately $32,217 made at restaurants in the Los Angeles area. (Id.)

B. Procedural History

On May 12, 2011, the IRB recommended to the IBT's General President, James P. Hoffa, that charges for embezzlement of union funds be filed against Kenny, Moreno, and Guillory. (Proposed Charges dated May 12, 2011, Ex. A to Application 162.) On May 19, 2011, the IBT's General President filed those charges. (Ltr. from James T. Hoffa to John J. Cronin, Jr. dated May 19, 2011, Ex. B to Application 162, at 1.) On August 3,

2011, a hearing on the charges was held before a panel appointed by the General President, and by written decision dated August 29, 2011, the panel found that the charges were proven as to Kenny, Moreno, and Guillory. (See Hr'g Tr. dated Aug. 3, 2011, Ex. E to Application 162; IBT Decision passim.) The General President adopted the panel's findings and the penalties that the panel proposed. (IBT Decision at 1.) Kenny received the following penalties: 1) a ten-year suspension from holding office or employment with Local 630 or the IBT; 2) a five-year suspension from membership with Local 630 or the IBT; and 3) a fine of $168,168. (IBT Decision at 11-12.) Moreno received the following penalties: 1) a five-year suspension from holding employment with Local 630 or the IBT; 2) a three-year suspension from membership with Local 630 or the IBT; and 3) a fine of $39,595. (Id. at 12.) Guillory received the following penalties: 1) a five-year suspension from holding employment with Local 630 or the IBT; 2) a three-year suspension from membership with Local 630 or the IBT; and 3) a fine of $32,217. (Id.) On September 21, 2011, the IRB reviewed the decision and found it to be not inadequate. (Ltr. from John J. Cronin, Jr. to James T. Hoffa dated September 21, 2011, Ex. G to Application 162.)

In August 2012, counsel for Moreno and Guillory and counsel for Kenny requested reconsideration of the IRB's finding. (Ltr.

from Lilys D. McCoy to John J. Cronin, Jr. dated Aug. 3, 2012 ("McCoy Aug. 3, 2012 Ltr."), Ex. I to Application 162; Ltr. from Douglas N. Silverstein to John J. Cronin, Jr. dated Aug. 3, 2012 ("Silverstein Aug. 3, 2012 Ltr."), Ex. I to Application 162.) After reviewing these submissions, the IRB found that "there is no basis for changing the IRB's finding that the IBT [D]ecision was not inadequate." (Ltr. from John J. Cronin, Jr. to Lilys D. McCoy and Douglas N. Silverstein dated Aug. 21, 2012 ("Admin. Ltr."), Ex. J to Application 162, at 1.)

Application 162 was then submitted to this Court. Kenny submitted objections to Application 162 on March 1, 2013 and evidentiary objections on April 18, 2013. On April 15, 2013, Moreno and Guillory submitted objections to Application 162. On March 18 and April 25, 2013, the Chief Investigator submitted memoranda of law in support of Application 162. Kenny replied on April 5, 2013 and Moreno and Guillory replied on April 25, 2013. On June 21, 2013, the government of the United States of America (the "Government") submitted a letter in support of Application 162. Kenny as well as Moreno and Guillory objected to the Government's submission as untimely and cumulative.[2]

[2] Even if these objections to the Government's letter were sustained, the conclusion reached herein would not change because all of the substantive arguments raised by Kenny, Moreno, and Guillory fail on the merits.

II. LEGAL STANDARDS

A. Standard of Review

The standards governing this Court's review of IRB disciplinary decisions are well established. This Court reviews determinations made by the IRB under an "extremely deferential standard of review." United States v. IBT ("Carey & Hamilton"), 247 F.3d 370, 379 (2d Cir. 2001); United States v. IBT ("Simpson"), 120 F.3d 341, 346 (2d Cir. 1997); United States v. IBT ("DiGirlamo"), 19 F.3d 816, 819-20 (2d Cir. 1994); see also United States v. IBT ("Parise"), 970 F.2d 1132, 1137 (2d Cir. 1992) (IRB decision must be upheld if it is "within the realm of reason"). The IRB Rules, which were approved by this Court and the Court of Appeals, provide for review of decisions of the IRB under "the standard of review applicable to review of final federal agency action under the Administrative Procedure Act." IRB Rules ¶ O; see United States v. IBT, 803 F. Supp. 761, 805-06 (S.D.N.Y. 1992), aff'd as modified, 998 F.2d 1101 (2d Cir. 1993). Under this standard, an IRB decision may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Carey & Hamilton, 247 F.3d at 380 (quoting 5 U.S.C. § 706(2)(A)).

In accordance with this standard, this Court reviews "the IRB's findings of fact for 'substantial evidence' on the whole record." United States v. IBT ("Giacumbo"), 170 F.3d 136, 143

(2d Cir. 1999). "The substantial evidence test is deferential." Id. "Substantial evidence is 'something less than the weight of the evidence,'" Simpson, 120 F.3d at 346 (quoting DiGirlamo, 19 F.3d at 820), "but something 'more than a mere scintilla,'" id. (quoting United States v. IBT ("Cimino"), 964 F.2d 1308, 1311-12 (2d Cir. 1992)). "Substantial evidence includes such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. (internal quotation marks omitted). Moreover, the mere possibility of drawing two inconsistent conclusions from the evidence does not prevent the IRB's findings from being supported by substantial evidence. Carey & Hamilton, 247 F.3d at 380 (citations omitted). Further, the IRB's findings cannot be overturned merely by identifying alternative findings that could potentially be supported by the evidence. See Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) ("The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence."). "Rather, the Court must find that the evidence 'not only supports [a contrary] conclusion, but compels it.'" Hahs, 652 F. Supp. 2d at 451-52 (quoting INS v. Elias-Zacarias, 502 U.S. 478, 481 n. 1 (1992) (emphasis in original)).

B. Fiduciary Duties of Union Officers

Under the Labor–Management Reporting and Disclosure Act of 1959 (the "LMRDA"), "officers [and] agents . . . of a labor

organization occupy positions of trust in relation to [the] organization and its members as a group . . . ." 29 U.S.C. § 501(a). Thus, IBT officers have "ha[ve] fiduciary obligations to IBT members in handling the union's money." Carey & Hamilton, 247 F.3d at 381. In other words, "[a]s a fiduciary, an IBT officer enjoys the trust of the general membership[, and] [i]n exchange for this privilege, each officer is bound to serve the membership's interest." United States v. IBT ("Ross"), 826 F. Supp. 749, 756 (S.D.N.Y.1993), aff'd, 22 F.3d 1091 (2d Cir. 1994) (table decision); see also United States v. Boffa, 688 F.2d 919, 930-31 (3d Cir. 1982) ("We believe that the LMRDA established, as a matter of federal law, union members' right to the honest and faithful services of union officials."). This Court has noted that IBT officials have a "fiduciary obligation to ensure that union funds were used only for union purposes." Hahs, 652 F. Supp. 2d at 452 (citing 29 U.S.C. § 501(a); IBT Const. art. XIX, § 7(b)(3)).

III. ANALAYSIS

A. Kenny

In his submission to the IRB, Kenny requested the IRB to reconsider the not inadequate finding. Kenny argued that there was insufficient evidence of his intent to embezzle, that the IBT acted arbitrarily, and also that IBT "did not apply the

burden of proof correctly." (McCoy Aug. 3, 2012 Ltr. at 4-8.) Kenny's subsequent submissions are limited to substantially similar, albeit more lengthy, arguments on these points. The IBT Decision found that there was significant evidence of Kenny's intent to embezzle. (IBT Decision at 7-10.) For example, the IBT found:

> As an initial matter, we stress that it is our view that an occasional expenditure of Union funds for an "in-town" business meal, even one attended only by Union officials and/or Union employees, is not per se inappropriate. Nor, we believe, is it per se inappropriate for Union funds to be expended occasionally for moderate amounts of alcoholic beverages consumed during a business meal. But, under any objective view of the evidence here, Brothers Kenny, Moreno and Guillory went far beyond anything that could be considered reasonable or appropriate. The evidence indicates that they regularly spent extended periods of time at local restaurants eating and drinking, frequently consuming extreme quantities of alcohol, all at Union expense and in circumstances in which it is impossible to conclude that there [was] a proper union purpose for the expenses.

(IBT Decision at 7-8.)[3]

Moreover, the IBT properly found that because Kenny was claiming that the frequent restaurant charges had a union purpose despite the lack of documentation of any union purpose, he was obligated to present evidence of any such union purpose.

[3] One example, among many, of consumption of an extreme quantity of alcohol is a charge of $304 for nineteen drinks consumed by Kenny, a Local officer, and a Local Business Agent between 12:30 p.m. and 2:46 p.m. on September 14, 2007. (Ex. 260 to May 12, 2011 Charge Report.)

(IBT Decision at 8.) Kenny presented no grounds to change the IRB's not inadequate finding.

Kenny's submissions make passing objections to the use of hearsay and the procedures used in the hearing. (See, e.g., McCoy Ltr. at 9; Kenny Evidentiary Obj. 2-4.) After over twenty years of court decisions on consent decree disciplinary proceedings, Kenny made no reference to any of the cases that have considered these issues. Indeed, it is well established that reliable hearsay is admissible in union disciplinary proceedings. See, e.g., Cimino, 964 F.2d at 1312-13. As to Kenny's generalized objections to the disciplinary procedures, the Court of Appeals summarized the law applicable to what constitutes a full and fair hearing for union discipline under 29 U.S.C. § 411(a)(5) as follows:

> The "full and fair hearing" requirement of the LMRDA incorporates the "traditional concepts of due process." See Kuebler v. Cleveland Lithographers & Photoengravers Local Union 24-P, 473 F.2d 359, 363-64 (6th Cir. 1973). Not all of the due process protections available in the federal courts apply to union disciplinary proceedings. See Wellman v. International Union of Operating Eng'rs, 812 F.2d 1204, 1205 (9th Cir. 1987) ("While we apply traditional due process concepts, we recognize that a union has a significant interest in controlling internal discipline, and so do not require the union's disciplinary proceeding to incorporate the same protections found in criminal proceedings."). Such proceedings need only adhere to the "basic principles of due process." See Mayle v. Laborer's Int'l Union of N. Am. Local 1105, 866 F.2d 144, 146 (6th Cir.

> 1988); cf. Wildberger v. American Fed'n of Gov't Employees AFL-CIO, 318 U.S. App. DC 194, 86 F.3d 1188, 1193 (D.C. Cir. 1996) (the LMRDA protects only against a "breach of fundamental fairness.")

Carey & Hamilton, 247 F.3d at 385. Kenny has raised no issue that suggests he did not receive a full and fair hearing. Accordingly, Application 162 is granted as to Kenney.

B. Moreno and Guillory

In their submissions, Moreno and Guillory also argue that there was insufficient evidence introduced at the IBT hearing of their intent to embezzle. (See, e.g., Silverstein Aug. 3, 2012 Ltr. at 1, 3; Objections dated May 13, 2013 passim.) However, the IBT found ample facts to infer intent to embezzle from the evidence, including the nature and amount of the alcoholic beverages purchased. Thus, there is no basis to change the IRB's finding that the IBT Decision was not inadequate.

At the IBT hearing, Moreno and Guillory were represented by the same attorney as Kenny. Their current counsel now claims that, "[b]ecause our clients were jointly represented by Paul Kenny's attorney, substantial evidence regarding Paul Kenny was not introduced in the underlying investigation and hearing. Although this evidence damns Paul Kenny, this evidence exonerates our clients." (Silverstein Aug. 3, 2012 Ltr. at 3 (emphasis in original omitted).) Moreno and Guillory chose to be represented by the same attorney as Kenny both during their

IRB sworn examinations and at the IBT hearing. The sworn examination notices sent to Moreno and Guillory stated, "You have the right to be represented by legal counsel or a member of the International Brotherhood of Teamsters, of your choosing, at said examination." (Exs. A and B to the Admin. Ltr.) After the IRB-recommended charges were filed against them and the IBT had scheduled a hearing on the charges, the IBT notified Moreno and Guillory, "You have the right to the assistance of counsel at the hearing. Counsel will be given a full opportunity to present or examine all witnesses, introduce evidence, and make any argument relevant to this matter." (Exs. C and D to the Admin. Ltr.) Moreno and Guillory made the choice both at the time of their IRB sworn examinations and then again after the IRB-recommended charges had been filed against them to be represented by counsel who also represented Kenny.

The case that Moreno and Guillory cited in support of their conflict claim, Flatt v. Superior Court, 9 Cal. 4th 275, 284 (1994), (Silverstein Ltr. at 2), is inapposite. In Flatt, an attorney malpractice action, the Supreme Court of California held that an attorney appropriately terminated the representation of a new client who wanted to file suit against one of the attorney's firm's pre-existing clients. See 9 Cal. 4th at 278. The issue there was whether there was a cause of action available against the prior attorney. See id.

Critically, the question of whether there could be any relief in the proceeding where a conflict existed was not addressed.[4]

In any event, the "additional evidence" Moreno and Guillory provided with their letter to the IRB, which they claimed would have been introduced at the IBT hearing had they not been represented by the same attorney who represented Kenny, does not provide a defense to the charges that they breached their fiduciary duties and embezzled union funds. The declarations they submitted as "additional evidence" contended they had no choice but to go along with the meal charges because Kenny was a tyrant and he would have fired them if they did not go along with the meals, but economic coercion is not available to them as a defense. Nevertheless, the evidence also established that Moreno and Guillory each caused the Local to pay for inappropriate restaurant charges even when Kenny was not present. Moreover, in its decision, the IBT considered that Moreno and Guillory were "merely employees and not officers of the Local Union" and found that, "[a]t a minimum, they served as Kenny's enablers, undertaking to place some of the drinking binges and other excesses on their own credit cards so that Kenny would not have to charge them on his Union credit card. Either way, they were responsible for many of the inappropriate

[4] Further distinguishing Flatt from the instant application is the fact that Flatt involved in civil proceeding in California state court and not a union disciplinary proceeding.

charges being submitted to and paid by the Local Union." (IBT Decision at 10.)

Guillory and Moreno's arguments that their embezzlements and knowing participation in Kenny's embezzlement of union funds should be excused because they were afraid of losing their jobs as business agents are also without merit. As business agents, they were fiduciaries with respect to union funds. See 29 U.S.C. § 501(a). Thus, they had a direct responsibility to the Local's members for the money that the Local held in trust. Even in their "additional" evidence, they do not suggest that they took any steps to exercise their responsibilities to the members to use the funds solely for union purposes. Now, they argue that their self-interest in not being fired caused them to participate in Kenny's embezzlements. Even if true, such self-interest cannot negate their proven intent to embezzle.

Accordingly, Application 162 is granted as to Moreno and Guillory.

IV. CONCLUSION

For the reasons set forth above, the IRB's determination that the IBT's decision was not inadequate is affirmed in all respects. Accordingly, Application 162 is GRANTED.

SO ORDERED.

Dated: New York, New York
January 7, 2014

Loretta A. Preska

LORETTA A. PRESKA
Chief United States District Judge