INTERNATIONAL BROTHERHOOD OF TEAMSTERS

JAMES P. HOFFA
General President

25 Louisiana Avenue, NW
Washington, DC 20001

KEN HALL
General Secretary-Treasurer

202.624.6800
www.teamster.org

August 30, 2016

Mr. Charles A. Bertucio
310 Miller Court
Orinda, CA 94563

Re: Panel Report and Recommendation

Dear Mr. Bertucio:

You will find enclosed the Report and Recommendations of the Panel that conducted the hearings on the charges filed against you. I have had the opportunity to review the Panel's findings and recommendations and hereby adopt them as my own.

The Panel's recommendation is reissued as the decision of the General President.

Fraternally yours,

James P. Hoffa
General President

JPH:gwc
Enclosure

cc: General Executive Board
Hearing Panel
Roland Acevedo, Esq.
Teamsters Local Union 853
Joseph diGenova, Esq.
Benjamin Civiletti, Esq.
John Cronin
William Keane, Esq.

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REPORT AND RECOMMENDATION

TO: James P. Hoffa, General President

FROM: Greg Nowak, Panel Chairman
Marvin Kropp, Panel Member
Robert Mele, Panel Member

RE: Hearing on Charges Against Charles Bertucio

DATE: August 26, 2016

Introduction

On February 11, 2016, the Independent Review Board (IRB) referred charges against Charles Bertucio, alleged to be a member of Local Union 853, to General President Hoffa for appropriate action under the Consent Order entered in *United States v. Teamsters,* 88 Civ. 4486 (LAP). By letter dated February 18, 2016, the General President adopted and filed the charges. Subsequently, the undersigned were appointed to conduct a hearing at which Mr. Bertucio could present his views relative to the allegations in the referral.

That hearing was conducted on August 8, 2016, in San Francisco. Mr. Bertucio was represented by counsel of his choice, William Keane, while the charges were presented by Roland Acevado. The parties have been provided a copy of the transcript of the proceedings and afforded the opportunity to present post-hearing statements. We have had the opportunity to review the hearing transcript and the post-hearing submissions filed by the parties on August 19,

2016, and make this report based on our evaluation of the witness and the documentary record.

The Charge

The IRB referred, and the General President adopted and filed, the following charge:

> While an IBT member, you [Charles Bertucio] brought reproach upon the IBT and violated Article II, Section 2(a) and Article XIV, Section 3 of the IBT Constitution in violation of Article XIX, Sections 7(b)(1) and (2) of the IBT Constitution to wit:
>
> In 2012, you became a Local 853 member and, as the sole owner of the GrandFund, never delegated to the IBT the sole right to negotiate your compensation as required when you became an IBT member. You continued during your membership to have a sham contract between your company, the GrandFund, and Local 853, as detailed in the above report. You signed a contract as owner that excluded your compensation from IBT control. When you applied for membership, you agreed to make Local 853 the sole bargaining representative between you and the company which you totally owned, a condition not capable of being fulfilled.

Factual Findings

As alleged, Charles Bertucio is the sole owner and President of GrandFund, a company he founded in or about 1989, whose mission is to assist employee medical benefit trust funds obtain health insurance and related products at the most favorable rates. GrandFund was purchased by Ullico in 2001, and Bertucio became an employee of that insurance company, along with Ed Logue. Logue was a GrandFund salesman with whom Bertucio had worked since 1996. Logue marketed products to labor benefit trust funds and was an IRS-1099 consultant/contractor with GrandFund, before his employment with Ullico. Among the funds with which Logue did business, was the Teamsters Benefit Trust (TBT), an account that he brought into the GrandFund as a client.

While Bertucio and Logue worked for Ullico, they were W-2 employees. In 2003, Bertucio bought a portion of GrandFund from Ullico and resumed sole control of Grand Fund's health insurance business. It focused on identifying

options for trust funds to obtain prescription drug programs, while the former Grand Fund business retained by Ullico primarily marketed HMO programs. Approximately 25% of GrandFund's business currently is conducted with Teamster-related benefit funds. Upon GrandFund's re-emergence as an independent company, Bertucio was advised by his accountant that Logue should be a W-2 employee, rather than a consultant/contractor. Bertucio accepted that advice and hired Logue as an employee. Shortly thereafter, GrandFund hired an additional W-2 employee, Bertucio's sister, Lisa Ramsey. Ramsey previously had worked for her father, William B. Bertucio, as an administrative employee/secretary for GrandFund Investment Group (GFIG). She assumed a similar role at GrandFund.

At the time of his hiring by GrandFund in 2003, Logue had survived several bouts with cancer and was determined to secure reliable and comprehensive health insurance.[1] Having become familiar with local labor organizations affiliated with both the IBT and the International Association of Machinists (IAM) through his marketing of insurance packages to benefit funds affiliated with those unions, Logue apparently determined that a union contract would be the best avenue for obtaining the best possible health benefit program. He asked Bertucio whether he would object to having a union contract and Bertucio told him he could "do whatever it is you want to do."

When Ramsey was hired in March 2004, Logue spoke to her about joining a union and attained her consent. Logue previously had contacts with Rome Aloise, an officer of IBT Local 853, through his sales efforts with Teamster related benefit funds. Aloise was a trustee on a number of Teamster-related benefit funds in the area. His local union also represented bargaining units of clerical employees.

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[1] The IRB referral dismissively rejects the notion that Logue initiated the unionization of GrandFund as the "dead man did it story." (IRB Referral at 6) We reject that callous speculation, which is unsupported by any evidence, let alone a preponderance of reliable evidence. The record reflects that Logue had a history of cancer which impaired his ability to obtain individual insurance coverage, particularly without exclusions for pre-existing conditions, such as his recurrent cancer. . He might have obtained coverage that excluded his existing illness, which would hardly have satisfied his concerns. Or, he could have obtained COBRA coverage based on his employment with Ullico, which would have been only a short term solution and expensive. In contrast to Logue's legitimate and desperate interest in obtaining long-term medical insurance, a pension and retiree insurance, Bertucio was healthy and insurable. We find it entirely credible that Logue, a medical insurance salesman familiar with union health benefit trust funds, their eligibility requirements and costs, would have considered such a plan as the solution to his problem.

Ramsey also had some familiarity with the IBT since her husband worked for WasteManagement and was a member of another IBT local union. In fact, at the time she was hired by GrandFund, Ramsey had health insurance under the Teamsters affiliated East Bay Drayage Health & Welfare Fund, through her husband's collective bargaining agreement.[2]

Bertucio testified that he voluntarily recognized Local 853, the union selected by his employees. He discussed a collective bargaining agreement with Aloise, who he had known for many years through his business dealings. The Local provided Bertucio with a draft contract.[3] Bertucio was not sophisticated in labor-management relations and did not closely examine the proposal.[4] However, he informed Aloise that his major concern was maintaining sufficient flexibility so he could pay his sales employees a fair share of the company's profits when they were available but, at the same time, not be obligated to a specific amount of commissions during lean years. He contended that it was difficult to predict the future profitability of the new company because of the many variables in pricing medical services. As a compromise, the proposed contract established a base monthly salary for sales representative plus a commission in an amount to be determined by Bertucio.[5] Clerical employees received specified hourly rates and annual increases.

Ramsey testified that Logue obtained a copy of the draft collective bargaining agreement with IBT Local 853 and showed it to her in 2004. At the time, Ramsey was working on a part-time basis and did not carefully study the contract or recall extended discussions with Logue over its terms. Ramsey was satisfied with the proposal. Logue was the only other covered employee, and the

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[2] The IRB contends that Bertucio was motivated to sign a contract with Local 853 in order to provide health insurance to Ramsey. That speculative conclusion is less plausible than the explanation that Logue needed and wanted insurance, inasmuch as Ramsey already had coverage through her husband and the matter of health insurance was never discussed when Bertucio offered to hire Ramsey. We credit the testimony presented during the hearing on this issue.

[3] Bertucio Ex. B. Bertucio testified that the highlighted provisions [health and welfare and retiree coverage, pension, expenses/car allowances, and the salary of sales representatives] of the Exhibit reflect issues over which he negotiated with the Local and that the handwritten notations were made by him.

[4] Nor was he at all familiar with negotiation or ratification procedures utilized by IBT local unions. As the "employer," there is no reason for him to be acquainted with internal union processes in which he had no role and for which he had no responsibility.

[5] In his IRB deposition, Aloise acknowledged that it was unusual to leave the commission rate unspecified. However, there were no follow-up questions or further explanation of Aloise's reason for agreeing to the contractual provision.

only sales representative covered by the monthly wage plus commission arrangement. No one testified that he had any objection.[6] The 2004 agreement was entered into between Local 853 and GrandFund and Logue and Ramsey became members of the union.[7] Logue became the shop steward. As such, he was responsible for dealing with the officials of Local 853.

In order to effectuate the health coverage included in the new agreement, Bertucio executed an Application and Subscriber's Agreement with Teamsters Benefit Trust (TBT). GrandFund had done business with TBT previously, and Logue had handled the account. Thus, he was familiar with the benefit package TBT provided and with the officials who administered the plan.

Although the completed Subscriber's Agreement form indicated there were three (3) covered employees, in fact there were only two (2). The form also indicated that one (1) supervisor was to be covered. TBT permitted employers to purchase health coverage for themselves, as well as for their employees. It is undisputed that GrandFund made the necessary contributions on behalf of three (3) participants, Logue, Ramsey and Bertucio,[8] the entire workforce.

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[6] Logue and Bertucio had worked together since 1996 and, presumably, Logue had some degree of confidence that Bertucio would treat him fairly. Logue died in July 2006.

[7] The IRB referral notes that Ramsey and Logue did not sign applications for membership in Local 853 until after the consummation of the collective bargaining agreement. The referral suggests this indicates the contract was negotiated before they designated Local 853 as their bargaining agent. However, as experienced union officials, we take notice of the fact that in a newly organized unit negotiating a first contract, employees are not required to formally join the union and begin to pay dues until after the first contract is consummated. We see no basis for drawing an inference that something was improper from the dates the membership applications were signed. Moreover, Ramsey's testimony unequivocally establishes that she and Logue wanted to join Local 853. Logue's application for membership indicates that he had been a member of IBT Local 70 and he transferred into Local 853. As a result, he was not required to pay an initiation fee, unlike Ramsey who paid $300.00. Unlike the IRB, we are not willing to speculate that Bertucio's voluntary recognition of Local 853 was improper, since the only evidence in the record is that both GrandFund employees wanted to join the union. Finally, we find that Logue's prior membership in another IBT local union does not support a conclusion that his application to join Local 853 was suspect. The record establishes that prior to Ramsey's hiring, Logue was the only GrandFund nominal employee, and he was considered to be a consultant/contractor until GrandFund was re-acquired from Ullico. Thus, Ramsey's hiring and Logue's new "employee" status created a two-person bargaining unit that could support an exclusive bargaining relationship with a union. There was no eight year gap during which Logue could have sought a union contract, as IRB asserts.

[8] The IRB referral asserts that Bertucio entered into the collective bargaining agreement to obtain health insurance for himself at a reduced rate because he was without coverage after he

After the contract was implemented, GrandFund hired Vickie Lanini as a sales representative. She had worked previously with Consumer Healthnet selling insurance products to union benefit trust funds, including funds sponsored under IBT negotiated collective bargaining agreements. She knew Logue, Bertucio and Aloise from her sales relationships and because they marketed among the same circle of union health benefit trust funds. Logue spoke to her about joining Local 853 and she was willing to do so.

Lanini testified with great sincerity about her family's long and extensive ties to labor unions and of her support for organized labor. At the time of her hiring by GrandFund, she had medical insurance through her husband, a member of the International Union of Operating Engineers (IUOE), as well as on her own behalf through her employer, Consumer Healthnet.[9] Lanini was advised of the 2004 collective bargaining agreement with Local 853 and was aware she was subject to a commission that was determined by Bertucio, rather than a formula or percentage specified in the agreement. Her experience under the 2004 collective bargaining agreement, and its successor contracts, is that she has been paid a commission each year of her employment, in addition to her base pay. She receives 40% of business she "brings in", with the remaining 60% going to GrandFund. Lanini testified this allocation is much more favorable to her than in her prior employment with Healthnet, where the amount of the commission was also at the sole discretion of her employer but where she received only 10% on her sales. And the testimony suggests that Lanini was eligible to receive an additional year-end bonus based upon GrandFund's performance, a benefit not specifically provided by the collective bargaining agreement.

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repurchased GrandFund from Ullico. There is no evidence as to whether Bertucio had coverage for himself at the time the 2004 collective bargaining agreement was negotiated. He testified that he had secured coverage through Blue Cross/Blue Shield when he did not have coverage through an employer. The only other relevant testimony is that Bertucio was insurable and, as an experienced health insurance agent, was aware of plans that provided coverage comparable to that offered by TBT at comparable or lower rates. The IRB referral merely speculates, without evidentiary support, that "the union group rate would have been less expensive than comparable individual policies." Similarly, the only record citation for the IRB referral's assertion that Bertucio was not insured after leaving Ullico is to Aloise's Declaration (Ex. 66), which merely recites that Bertucio and Logue left Ullico and that he (Aloise) was subsequently contacted by Logue about negotiating a collective bargaining agreement. Aloise was not asked, and made no declaration as to having knowledge, about whether Bertucio had medical insurance.

[9] Indeed, Lanini continued to receive health coverage from her husband's IUOE plan, at least through May 24, 2016. (Ex. G)

Logue succumbed to cancer in 2006 and Lanini assumed the role of shop steward since Ramsey was not interested in the position. As such, Lanini attended membership meetings of Local 853, as well as steward training seminars. She discussed union matters with Ramsey when necessary.

The collective bargaining agreement between GrandFund and Local 853 was renegotiated in 2007. There is scant evidence as to how it was negotiated or ratified. Bertucio believes he received a certified mail reopener from the Local and that a written proposal was presented. However, neither document was entered into the record by either party. The 2007 contract was submitted, which reflected some changes from the 2004 agreement. Of greatest concern to the IRB was the apparent reduction in the specified hourly wage rate paid to Ramsey in the first year of the agreement. However, according to Ramsey, her first year hourly rate was not, in fact, reduced and the stated rate in the contract was merely a mistake. Bertucio and Lanini also testified they failed to notice the error. All three GrandFund witnesses testified that Ramsey was paid more than the contract required, despite the stated hourly amount. And the contract provided annual hourly increases for the remaining term.

The 2007 contract provided a 401(k) plan with a specified employer contribution and an increase in the employer's contribution to the TBT Retirement Security Plan. The amount of monthly contribution to the TBT also was increased from $675.00 per month to $993.00. The contract expired on February 28, 2012. A new Subscriber's Agreement was executed with TBT reflecting the newly negotiated contribution rates.[10]

The next contract was executed by the parties in July 2012, retroactive to March 1, 2012. Email communications between Lanini and Ramsey disclose that Aloise, Bertucio and Lanini met at some time before March 1, 2012, to discuss a new contract. Ramsey and Lanini communicated via emails about what additional benefits they might seek and, subsequently, Ramsey indicated that the current agreement was "fine" with her. (Ex. C) Lanini, the union shop steward, considered that she and Ramsey had "voted" on the 2012 contract proposal by meeting over lunch and agreeing that it was acceptable. The proposal increased the company paid contributions to the TBT health and welfare and retirement benefit funds.

[10] As was the case with the initial Subscriber's Agreement, the 2007 version included errors. Only two participants were indicated, both of whom were members of the bargaining unit. As for non-collectively bargained employees covered, there were none listed. Despite this discrepancy, GrandFund made contributions on three participants.

Ramsey's hourly rate was increased by $1.00 per year. Lanini emailed Aloise on March 5, 2012, to verify the changes.

At some point during the contract renewal discussions, Bertucio allegedly was advised "by some auditor" that in order for him to receive health insurance coverage from the TBT, he had to become a member of Local 853. The record does not reflect who advised Bertucio of this purported requirement. Bertucio speculated that the TBT may have thought that he was a bargaining unit employee following GrandFund's conversion to an "S Corporation," a change that required him to be listed as an "employee" for tax purposes. Bertucio did not want to deal with two insurance companies, nor did he want to jeopardize the coverage that Lanini and Ramsey received from TBT were that fund to cancel coverage because of Bertucio's failure to become a participant. Thus, upon being advised that he had to join Local 853, Bertucio contacted Lanini to ascertain whether it was acceptable to the union. Lanini reported that it was. Bertucio completed an application for membership and paid a $750.00 initiation fee, more than double the fee paid by Ramsey and $150.00 more than paid by Lanini, although he and Lanini paid the same dues rate.[11] The record does not reflect that Bertucio ever discussed joining the union with Aloise. Rather, email correspondence among Ramsey, Lanini and Local 853 employee Jennifer Payne reflect that Bertucio's membership application was accepted, with references to acquiescence by Aloise.

The entire question of Bertucio's decision to join Local 853 to qualify for health coverage appears to have emerged as a result of bad information. Bertucio had received coverage from the TBT from the execution of the first contract in 2004, despite never becoming a member of the union. Pursuant to the Subscriber's Agreement, managerial non-bargaining unit individuals could obtain health coverage provided the employer paid the contractual premiums for the owner and all employees in the bargaining unit. Not only does the Subscriber's Agreement suggest an owner's eligibility for benefits, but we take note of the declaration of Nora Johnson, the TBT Fund Manager, that confirms that Bertucio was eligible for benefits regardless of his non-membership in a union. (Ex. I, not offered into evidence) Each of the undersigned is aware of similar provisions in the health benefit funds with which we are associated.

In any event, Bertucio joined Local 853. He did not participate in any union activities and did not attend any type of meeting that he had not attended before he became a member. As was the case prior to his membership, Bertucio attended

[11] Logue also had paid the same dues rate as Bertucio and Lanini.

trust fund meetings when invited and charitable events sponsored by the union, as did other vendors who provided services to the Union or affiliated trust funds. Bertucio attended the Unity Conference both before and after he became a member of Local 853. The panel members take notice of the fact that many others who are not members of the IBT attend that Conference, which is held in conjunction with the charitable golf tournament that supports the James R. Hoffa Memorial Scholarship Fund. Lanini confirmed that it was common practice for service providers and vendors to attend such functions and that she did so before she became a member of Local 853. Indeed, such meetings provided an opportunity for service providers and union and trust fund officials to informally meet and discuss products and marketing opportunities. The meetings that Bertucio attended both before and after becoming a union member were open to members and non-members alike. In contrast, once Lanini became a member, she attended membership and steward meetings at Local 853 that were only open to members of the union. Bertucio never attended those events.

There is nothing in the record that reflects that Bertucio utilized his union membership or the fact that GrandFund had a union contract to market the GrandFund or enhance its solicitation of business with union-related benefit trust funds.[12] There is nothing in the record that supports a theory that Bertucio obtained membership in order to support his "friend" Aloise in the furtherance of Aloise's political aspirations.

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[12] While the record is devoid of any suggestion Bertucio used GrandFund's union contract as a marketing tool, the panel notes that it is a common and mutually beneficial practice for companies and unions with good labor-management relations to publicize their rapport. For example, union print shops display a "union label" which is often a prerequisite to obtaining work in the labor movement. Ford Motor Company routinely affixes decals on its products advertising its working relationship with the United Auto Workers. Many unionized trucking companies have the Teamster logo on their trailers. Grocery stores advertise the fact they are UFCW shops. Barbers frequently have a union affiliation plaque in their windows. Union newsletters often contain advisories urging members to "Patronize" union merchants while similarly suggesting that members "Do Not Patronize" non-union companies. Unions routinely negotiate contract provisions that require companies to display the union logo on company uniforms or allow employees to wear union pins while at work. The simple fact is that if a union and company have a cooperative relationship, it benefits the union for the company to flourish and hire more employees, and have more resources with which to pay better wages and benefits. And, obviously, if the union generates more business for the company, it is also beneficial for the members who prosper when the company succeeds. We are not aware that such mutually beneficial expressions of labor-management cooperation violate any law or commercial ethic.

The 2012 contract expired on February 28, 2015. By letter dated December 5, 2014, Aloise notified Bertucio that the contract was open for renegotiation and proposed a meeting "at an early date in order that we may consummate a new Contract as promptly as possible." Emails were exchanged on December 20, 2014[13] that resulted in a meeting on December 24, 2014, between Bertucio and Aloise. Thereafter, on or about February 15, 2015, Lanini and Ramsey prepared a proposal for a new agreement that included an annual 7% wage increase for the clerical employee(s), additional paid holidays and improved bereavement leave.

Negotiations were never concluded on the 2015 contract. Bertucio resigned his membership in Local 853, having taken a withdrawal card on December 11, 2015. (Ex. 24)

Analysis

Two preliminary observations are appropriate. First, we note that while much of the IRB referral details activities that occurred prior to 2012, the actual charges are based, as they must be, on Bertucio's actions while he was a member of Local 853. Disciplinary procedures under Article XIX of the Teamsters Constitution, including referrals by the IRB, are subject to a five year statute of limitations and may only be brought against members of the Union. Thus, our first issue is to determine whether the 2012 collective bargaining agreement, the only contract in effect during the applicable time that Bertucio was a member, constituted a "sham" contract.

Second, while the IRB referral details at great length the actions taken by Local 853 prior to 2012, many of which the IRB contends are inconsistent with the Local's obligations under the IBT Constitution and/or the Local 853 Bylaws, those failures (if indeed they were such) cannot be ascribed to Bertucio. The responsibility for negotiating and ratifying collective bargaining agreements does not lie with the employer, or even an individual member of the bargaining unit. Thus, it is not within the jurisdiction of this panel to determine whether the Local

[13] The IRB referral makes much of the content of Aloise's email, and, specifically the phrase regarding "actual negotiations and a vote..." Both the IRB and counsel for the IBT seek to emphasize the word "actual," implying that all prior negotiations were charades or fake. We decline to make that leap from the cold text. Moreover, we have no basis for ascribing to Bertucio any implication to be derived from a word in an email authored by Aloise. We understand that the Independent Review Officer (IRO) intends to conduct a hearing on the charges against Aloise. Thus, we leave it to the IRO to determine Aloise's meaning based upon Aloise's testimony in that proceeding.

did something improperly; rather, our role is to determine whether any of Bertucio's actions or inactions violated his obligations as a member.

The "Sham" Contract

The 2012 collective bargaining agreement was executed by the parties on July 25, 2012, although it was retroactive to March 1, 2012. Bertucio signed his application for membership on March 30, 2012, and became a member in April. Thus, he was subject to the International Constitution and his Oath of Membership at the time the 2012 agreement was signed.

There are no cases in which the IRB clearly has defined what constitutes a "sham" contract. Nor have we been informed of a legal definition adopted by any court or labor board that would establish a bright line between "sham" and legitimate contracts. The most useful statement in the cited decisions appears in the *Slawson* report where the panel noted that "a sham contract is one entered into by a labor organization which does not have a legitimate collective bargaining purpose, such as when benefitting the supposed employer is the real purpose for the relationship."

Examination of the 2012 GrandFund contract reveals that it contains virtually all of the items one would expect to find in a standard, legitimate collective bargaining agreement. It establishes the terms and conditions of employment for the employees and includes contractual matters that are of importance to the union as an institution. It provides employees with guaranteed minimum hours of work, overtime, vacation benefits, wages, health and welfare, pension/401(k), sick leave, seniority rights, holidays, FMLA leave, bereavement leave, jury pay, and a grievance procedure. It recognizes the union as the exclusive bargaining representative, contains a union security clause requiring membership as a condition of employment, protects the right of union representatives to contact employees at work, and guarantees that the contract will bind successor employers. There is nothing in the record that suggests that GrandFund did not satisfy its obligations to its employees or make contributions on behalf of all the participants to the benefit funds under the terms of the contract and/or Subscriber's Agreement. Bertucio has not been identified as a person who has committed any criminal misconduct or has association with any criminal group.

Nonetheless, the IRB contends that the contract is a "sham" because (1) Ramsey was not paid strictly in accordance with its terms and (2) the employer

retained discretion to establish the commission rate for Lanini, its Sales Representative.

The panel members, as experienced Union officials, recognize there is a distinction between an "inadequate" contract and a "sham" agreement. Defining the former is subject to considerable debate, as economic conditions vary between employers and labor markets and make comparisons between contracts difficult; the latter is often evidenced by its intent to perpetrate a fraud by entering into an agreement that benefits the employer, rather than the employees. The panel members also realize that the ultimate test of whether a proposed collective bargaining agreement is "inadequate" includes whether the members of the bargaining unit are satisfied with its terms, whether the employer complies with its obligations and whether all of the employees receive the terms and conditions set forth therein.

In evaluating whether the 2012 contract was inadequate, we start with the fact that the two workers covered by it testified they were aware of its terms and were satisfied with them. Ramsey's hourly rate during the first year of the contract was $25.00 and increased each year to $27.00 by the third year. The record does not reflect what Ramsey earned at her prior employer, GFIG. The panel has accessed the U.S. Department of Labor's 2012 Bureau of Labor Statistics California Occupation and Wage Survey for San Francisco-Oakland-Freemont (BLS) and ascertained that the median hourly wage for office and administrative support workers in that year was $20.20. By the time the BLS conducted it survey in 2015, the median hourly wage rate had risen to $20.98. By 2014, Ramsey's hourly rate under the contract was $27.00. In addition, the testimony established she received a bonus each year. Thus, we find the compensation package provided to Ramsey under the contract was not inadequate based upon area wage standards. And Ramsey was satisfied with the negotiated agreement.

Lanini had an established monthly base salary which generated a minimum annual salary of $60,000.00. She also received a commission calculated at a formula that averaged over the course of her employment at 40% of business she generated.[14] By 2012, Lanini had six years of work experience as a GrandFund

[14] We recognize that Lanini could not recall how her commission was calculated during her IRB deposition, a memory lapse she attributed to the stress and intimidation she felt during that examination. However, she testified without hesitation at the hearing that she received 40% of the business generated by her accounts, which was much more generous than the allocation at her prior employment. Bertucio testified similarly. The charging party did not present any evidence to the contrary.

employee and justifiably could rely on past practice as to the fairness or adequacy of the commission she received, even though the allocation was not specifically set forth in the contract. During her pre-GrandFund employment, the rate of commission was also within the discretion of her employer and Lanini only received 10% of the revenue she generated. Lanini testified that she was satisfied with the contract and her financial remuneration.

We do not find that the absence of a specified commission rate in the 2012 contract that is before us invalidates the entire contract or merits characterizing it as a "sham." Bertucio testified as to his reasons for insisting that a rate not be specified when the 2004 contract was negotiated. Since Lanini's hiring in 2006, she had a six year experience in which she received what she considered to be a generous commission. She did not make any request to the Local to propose a specific commission rate when the 2012 contract was open for negotiation. It is apparent that neither Bertucio nor the Local devoted extensive time negotiating for this small bargaining unit. After the 2007 agreement, it appears contract language was only altered to reflect new wage rates and benefit contribution amounts. The sales representative compensation language was not altered.

The record reflects that both Ramsey and Lanini were paid more than the minimums the contracts required by their terms.[15] We are not inclined to chastise an employer that, with the objective of sharing the company's financial success, pays more than the contract requires. Nor are we inclined to second guess the union officials who negotiated the contract and were in a better position to evaluate what was reasonable given the economics of the industry and the financial resources of the employer. Nor are we inclined to second guess an employee who found the contract acceptable and, despite being the steward, did not consider it necessary to amend the agreement to specify a commission rate. It is our understanding that courts give union officials a broad range of reasonableness in negotiating contracts and only find that the union has breached its duty of fair representation when the union's behavior is so far beyond that area of discretion as to be arbitrary, capricious or discriminatory. We believe Local 853's negotiation of the 2012 contract was within its discretion, and acceptable to the covered members.

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[15] We take notice of the collective bargaining agreements attached to Bertucio's post-hearing submission that are examples of contracts that set minimum standards that can be augmented at the discretion of the employer.

We are also aware that while not common, some industries and companies provide commissions or bonuses, the terms of which are not detailed in the collective bargaining agreement. Indeed, there are industries in which the employer has adopt performance standards providing commissions or incentive bonuses that exist entirely apart from the collective bargaining agreement yet sometimes supplant the hourly wage rates set forth in the contract as the basis for calculating employees' earnings. We refer specifically to contracts in the grocery warehouse industry where employers have unilaterally implemented commissions or performance bonuses, the specific terms of which are not set forth in the collective bargaining agreement. In many of those cases, the hourly wage rates provided in the collective bargaining agreement become little more than the minimum compensation a member must receive. While the IRB may consider the arrangement under which GrandFund calculated the compensation of its sales representatives to be extraordinary, we find it unusual but neither unique nor suspect.

Thus, we do not find the terms of the 2012 collective bargaining agreement to be inadequate, or outside the wide range of reasonableness the law grants to unions to negotiate contracts. To the contrary, the contract met or exceeded area wage averages and, by all accounts, served as a minimum for the total compensation received by the GrandFund employees. We reject the IRB's contention that the terms of the contract are evidence of a "sham" relationship intended to perpetrate a fraud or benefit the employer, rather than the employees.

This conclusion does not disregard prior IRB decisions that have found "sham" contract arrangements involving individuals who have entered into fraudulent agreements with a local union. But the elements common to those cases are not present here. GrandFund made contractual payments and contributions to, and on behalf of, all employees and trust funds as provided by the contract. Bertucio did not derive any benefit from the contract that was not also enjoyed by the remaining GrandFund employees. There is no evidence that he was unable to obtain health insurance for himself or at rates that were comparable to those charged by TBT. None of the individuals involved in GrandFund are barred from participating in the IBT for reasons reflected in the permanent injunction incorporated in the Consent Decree and continued in the Final Order and Agreement. There is no evidence that Bertucio used the distinction of being a "union contractor" to market GrandFund or promote himself. There is no evidence that Bertucio used either the contract or his membership to gain access to union meetings or markets to which he would otherwise have been excluded. Bertucio

never attended a union meeting to which union membership or a contractual relationship was required for admission.

At the time the 2012 contract was negotiated, the GrandFund employees had established memberships in Local 853 and, at least Lanini was an active participant. The GrandFund employees were aware of their union membership, were aware of the collective bargaining agreement, and paid their own dues and fees to maintain their membership. There was no basis upon which GrandFund could have contested Local 853's status as the bargaining agent. In short, there is no evidence that any fraud was committed in the formation of the 2012 contract or the maintenance of GrandFund as a union shop. Any possible deficiency in the procedures used by Local 853 to negotiate or ratify the 2012 agreement cannot be attributed to Bertucio and none was so fatal as to render the entire contract invalid.

Thus, we do not find the claim that the 2012 contract was a "sham" to be supported by a preponderance of reliable evidence.

The "Sham" Membership

It has been conceded that Bertucio should not have been a member of Local 853. The Recognition clause of the 2012 collective bargaining agreement provided that: "The Employer recognizes the Union as the sole collective bargaining agent for all office employees *except all regularly elected officers and appointed officers of the Employer.*" (Emphasis added) As the President of GrandFund, he was not included within the scope of the bargaining unit since he was not an "office employee" even if he may have been considered to be an "employee" by tax regulations. He resigned from union membership in December 2015, so his current status is not an issue.

The fact that Bertucio was not included in the bargaining unit is not evidence that the collective bargaining agreement was a "sham." As indicated above, Bertucio became a member based upon incorrect information. Regardless of what he was told by the TBT, he did not have to be a member in order to receive health coverage. Indeed, he had received health coverage from 2004, although he did not become a member of the Union until 2012. Other witnesses confirmed the confusion by testifying it was their understanding that Bertucio had to join the Union because three members were necessary for there to be a valid collective bargaining agreement. But Logue had died in 2006, leaving only Ramsey and Lanini as members of the bargaining unit and there was no issue when the contract

was renegotiated in 2007. And, in fact, there is no legal or Constitutional requirement that a bargaining unit consist of at least three employees.

Since Bertucio concedes that he should not have attained membership in Local 853, we address whether his actions violated his obligations under the Constitution and whether the Union suffered any harm as a result of any possible violation.[16]

The IRB contends that Bertucio violated Article XIV, Section 3 of the International Constitution in that he was the owner of GrandFund and, as such, could not delegate to the union the right to act as his exclusive bargaining representative. That is the sole basis for the IRB's contention that Bertucio violated his obligations as a member, not the fact that he was excluded from the bargaining unit by the terms of the contract. The IRB's theory dovetails with its contention that Bertucio's terms and conditions of employment were not established under the collective bargaining agreement between GrandFund and Local 853. The latter point is conceded.

The initial contention harkens back to a long running dispute between the IBT and the IRB over the intent of Article XIV, Section 3 and which entity has the authority to interpret that provision. We are certainly mindful that there are a number of IRB decisions in which the IRB has interpreted the Constitution in the manner urged here; namely, that <u>no</u> individual can be a member of the Union unless he/she is capable of delegating his/her rights to the union to act as the exclusive bargaining agent. And we have been provided with IRB decisions stretching back to 1998 affirming the IRB's position. Here, the IRB contends that we are compelled to follow those decisions. We respectfully disagree.

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[16] We do not challenge Bertucio's concession that, in his opinion, he should not have been granted membership in Local 853, but note that the Union retains the right to decide who to admit to membership. Bertucio applied for and was granted membership by the Local. The Local had the right to admit him, and any other worker whose membership would not violate the terms of the Consent Decree, the Final Agreement and Order or applicable law. While Bertucio held the title of President of GrandFund, he also continued to act as a sales representative, acting as a liaison between union benefit trusts and insurance providers. He performed work that was similar to the work performed by Lanini. He did not misrepresent his status when he applied, inasmuch as the application clearly reflected that he was the President of GrandFund. The only issue as far as the panel is concerned is whether Bertucio did any harm to the Union, or to any member, while he was a member and, if so, what would be an appropriate punishment.

Our review of the cited cases reveals the rather disturbing fact that the IRB continues to rely, and urges us to follow, decisions that were rendered based upon Constitutional language that is no longer in effect and, in fact, has not been in effect since 2001. Specifically, prior to the 2001 Convention, Article XIV, Section 3 read: "Every member by virtue of his membership in the Union, authorizes his local to act as his exclusive bargaining representative…" (Emphasis added) In its pre-2001 decisions, the IRB interpreted that as a condition of membership that had to be satisfied by anyone holding a membership card. The Union disagreed then, as it does now, and attempted to clarify the original intent of the provision by adopting an amendment at the 2001 Convention to make it clear that only members *covered by collective bargaining agreements* had to delegate to their unions the authority to act as their exclusive representatives. Thus, the delegates to the 2001 Convention amended Article XIV, Section 3, as follows: "Every member covered by a collective bargaining agreement at his place of employment authorizes his local union to act as his exclusive bargaining representative…" (Emphasis added)

That amendment was submitted to the Southern District of New York's Assistant United States Attorney's (AUSA) office for review, as required by the Consent Decree. The AUSA did not object to the IBT submitting the amendment to the delegates or its adoption by the delegates. Indeed, it is our understanding that representatives of the AUSA attended sessions of the Constitution Committee that reviewed proposed amendments and had the authority to prevent such proposals from being adopted by the delegates if they considered the amendment to hinder achieving the objectives of the Consent Decree.

We submit, therefore, that the IRB decisions issued prior to 2001 provide no basis for compelling us to act in the manner suggested by the IRB, and that the decisions issued since 2001 are of no greater import since they all rely upon the pre-2001 IRB decisions that are based on antiquated Constitutional language.

We believe that the intent of the 2001 Convention is amply clear, and that the officials of this Union have consistently maintained that Article XIV, Section 3 only applies to members covered by collective bargaining agreements. For the reasons set forth above, based upon the Recognition clause of the 2012 GrandFund agreement, Bertucio was not covered by the 2012 collective bargaining agreement and, consequently, Article XIV, Section 3 did not apply to him.

We also believe that the law recognizes that a union that has promulgated rules in a governing document has the right to interpret those rules and that courts must defer as long as the interpretation is not patently unreasonable. Indeed, as

officers in our respective Local Unions, we are governed by bylaws that similarly are subject to interpretation by our local union executive boards.

Thus, it is not difficult for us to choose whether to adopt the interpretation the IRB has imposed upon the Union, or the interpretation adopted by the General Executive Board. Were we to consider the larger picture, we would note that the stated objective of the Consent Decree was to eliminate the influence of outside forces and return the IBT to the control of its members. To that end, the IBT agreed to overhaul the procedures for electing its International officers by requiring local unions to conduct secret ballot elections of delegates to represent their members at IBT Conventions. Those delegates are empowered to act as a legislative body and adopt amendments to the IBT Constitution. The Constitution is subject to review by the AUSA to insure that democratic principles are maintained. Among those principles is the right of the members to vote in secret ballot elections for the IBT's officers. Pursuant to those provisions, the IBT has conducted elections of officers every five years since 1991, which elections have been independently supervised and the results of which have been independently certified. No other union in this country has conducted as many elections of officers or consistently afforded their members the right to select the leaders they endow with the right to administer their union through secret ballot rank and file voting. There can be no doubt that the elected IBT officers reflect the wishes of the voters.

It follows that those officers have, by the will of the membership, the right to exercise their Constitutional authority on behalf of the membership, including the right to interpret the Constitution between Conventions.

The IBT has never interpreted Article XIV, Section 3 as a requirement of attaining or retaining membership. Rules regarding the acquisition or maintenance of membership are dealt with elsewhere in the Constitution. Rather, Article XIV, Section 3 was intended to clarify the Union's right to act as the statutory bargaining agent for members *covered by collective bargaining agreements.* It was adopted at a time that employees in bargaining units were filing numerous claims that their union was not fairly representing them, particularly in the administration of grievance procedures. Thus, most of the provision expresses the law regarding the duty of fair representation, which clearly affirms the proposition that the union, not the individual employee, is authorized to resolve grievances on terms that the union determines best serves the membership at large, even if the resolution is not entirely satisfactory to the individual grievant.

Instead of reading Article XIV, Section 3 as a whole, the IRB insists upon focusing on a fragment of the first sentence, and interpreting that as requiring an affirmation that a member must make to cede authority to the bargaining agent. If the applicant for membership is not capable of making that affirmation, because he/she is not covered by a collective bargaining agreement, then the IRB asserts that the individual cannot be a member.

We need not defer to the IRB's opinion, in the face of a contrary interpretation issued by the elected officials of this Union and the clear history and intent evidenced by the actions of the duly elected delegates that adopted the 2001 amendment, without objection from the AUSA. Moreover, as is the case with any voluntary association, Article II, Section 2(a) of the Constitution provides that the determination of who can become a member is left to the "requirements of this Constitution and the rulings of the General Executive Board." The General President and General Executive Board have rejected the IRB's interpretation, and we recognize that they have the authority to "interpret the Constitution and laws of the International Union... and to decide all questions of law thereunder..." (Article VI, Section 4) We do not recognize the IRB's unilateral right to impose conditions of membership or dictate interpretations of the Constitution, in the absence of some existential threat that hampers the maintenance of a union free from corruption. No such threat is embodied in Bertucio or the GrandFund contract.

In the context of this referral, we consider the IRB's reliance on Article XIV, Section 3 either to suggest that the contract was a "sham" or that Bertucio violated his obligations under the Constitution merely by becoming a member to be erroneous and at odds with the clear preponderance of reliable evidence.

Conclusion and Recommendation

We are left to determine an appropriate remedy for the fact that from March 2012 through December 2015, Bertucio held membership in Local 853. As far as the record reflects, the only party to this transaction that benefitted from Bertucio's membership was Local 853, the recipient of his initiation fee and dues. There is nothing to suggest that the Local incurred any additional expense in representing Bertucio that would not have been incurred representing the other members of the bargaining unit.

Accordingly, we recommend that the membership that was extended to Bertucio be vacated and any record of his having established membership be expunged. This will prevent Bertucio from attempting to transfer into another IBT

local in the future based upon his "membership" in Local 853. This will also effectively revoke the honorable withdrawal card that was issued by Local 853, which could also potentially permit Bertucio to gain admission to another IBT local without first establishing that he was actually employed at the craft and paying the new local union's initiation fee. In short, the TITAN membership records for Local 853 should be corrected to eliminate any reference to Bertucio ever having been a member.

We recognize that Local 853 is not a party to these proceedings, but further recommend that in the event Bertucio requests that his initiation fee and the dues he paid during the period of his improper membership be refunded, the Local Union should do so.

Finally, the charge that Bertucio violated his obligations under the International Constitution by entering into a "sham" collective bargaining agreement should be dismissed.

Respectfully submitted,

/s/
Greg Nowak, Panel Chairman

/s/
Marvin Kropp, Panel Member

/s/
Robert Mele, Panel Member

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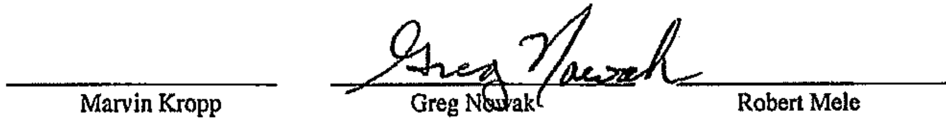

Marvin Kropp   Greg Nowak   Robert Mele

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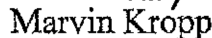

Greg Nowak — Marvin Kropp — Robert Mele

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