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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

JOSE GARCIA, et al.,
Plaintiffs,
vs.
SERVICE EMPLOYEES INTERNATIONAL
UNION, et al.,
Defendants.

Case No: C 09-4865 SBA

**ORDER DENYING PLAINTIFFS'
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND ORDER
TO SHOW CAUSE RE PRELIMINARY
INJUNCTION**

A hearing on Plaintiffs' "Ex-parte application for Temporary Restraining Order and Order to Show Cause re: Issue of Preliminary Injunction," was held by the Court on October 22, 2009. Dan Siegel and Jose Luis Fuentes appeared for Plaintiffs. Antonio Ruiz appeared for Defendants.

After consideration of the legal briefs, evidentiary declarations and submissions, oral arguments of the parties, and applicable law, the Court DENIES the application.

I. BACKGROUND

The eight Plaintiffs in this action: Jose Garcia, Hector Rincon, Amelia Medina, Doroteo Garcia, Laura Plummer, Argelio Cordova, Oscar Alonzo, and John Gray are members of a Local 1877 of the Service Employees International Union ("SEIU"). The law suit alleges violations of the Labor management Reporting and Disclosure Act ("LMRDA") at 29 U.S.C. § 401 et seq., by Defendant SEIU, Local 1877 and individual officers of the union. Among

1 other claims, Plaintiffs seek the following relief:

2 4. An order preliminarily staying the discipline
3 against Plaintiffs and union members such that
4 defendants are required to place plaintiffs and other
5 union members names on the ballot as candidates for
6 the office of President and Executive board in an
7 election to be conduct (sic) in 3 months from the
8 Court's order.

9 Local 1877 has approximately 35,000 members, located in
10 California and organized into a Southern Regional District
11 containing 23 Divisions, and a Northern District containing 21
12 Divisions. A periodic election, of statewide officers as well as
13 officers in each of the districts and divisions within the state,
14 is held every 3 years. An election is now scheduled to be held on
15 October 29, 2009. A notice of nominations was distributed to the
16 union members during the summer of 2009 and the nomination process
17 has now been completed. As of the time of this Court's hearing on
18 October 22, 2009, a final ballot, listing multiple candidates to
19 fill each of the union offices in the regional districts and the
20 divisions within them, has been printed in preparation for the
21 election. This ballot has already been sent to absentee voters
22 and it appears that some votes have already been cast.

23 Described generally, this lawsuit claims that that Plaintiffs
24 have been unlawfully disqualified by representatives of Local 1877
25 from running for office in the upcoming election; that this
26 conduct violates the LMRDA; that the election should be called
27 off; that they should be added as candidates on the ballot; and,
28 that an election including them as candidates should be held in
about 3 months.

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2 **II. APPLICABLE LAW**

3 **A. Granting Requirements for Preliminary relief**

4 In any case where a party seeks the extraordinary remedy of
5 preliminary relief by way of a Temporary Restraining Order ("TRO")
6 or a Preliminary Injunction, the party must meet exacting
7 criteria. The legal standard for a TRO is the same as for a
8 preliminary injunction. See Lockheed Missile & Space Co. v.
9 Hughes Aircraft, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); c.f.,
10 Motor Vehicle Board of Cal. v. Orrin W. Fox, 434 U.S. 1345, 1347
11 n.2 (1977). The standard for assessing a motion for preliminary
12 injunction is set forth in Winter v. Natural Res. Def. Council,
13 Inc., ---U.S. ---, 129 S.Ct. 365, 376 (2008). "Under Winter,
14 plaintiffs seeking a preliminary injunction must establish that
15 (1) they are likely to succeed on the merits; (2) they are likely
16 to suffer irreparable harm in the absence of preliminary relief;
17 (3) the balance of equities tips in their favor; and (4) a
18 preliminary injunction is in the public interest." Sierra Forest
19 Legacy v. Rey, --- F.3d ---, 2009 WL 2462216 at *3 (9th Cir. Aug.
20 13, 2009).

21 **B. Preliminary Relief Under the LMRDA**

22 The legal standard applicable to the question of whether a
23 District Court should grant preliminary relief in cases brought
24 under the LMRDA concerning union elections, has been established
25 by the United States Supreme Court in the seminal case of Local
26 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers,
27 Warehousemen and Packers v. Crowley, 467 U.S. 526 (1984). In
28 Crowley, Local 82 held a nomination meeting regarding union

1 candidates for an upcoming election for union officers. At the
2 meeting it was decided that one of the members of the union who
3 wished to run for the position of Secretary - Treasurer, would not
4 be able to run for that position, but that he would be allowed to
5 run for President. Thereafter, ballots for the election were
6 prepared and distributed to the members, who were instructed to
7 mark their ballots and return them by mail. Before the designated
8 return date, some members of the union filed a complaint alleging
9 a violation of the LMRDA and seeking to enjoin the upcoming
10 election. The District Court issued a TRO ordering that ballots
11 be seized and delivered to the court pending a hearing on whether
12 or not a preliminary injunction should be issued. The District
13 Court then found that the plaintiffs had demonstrated a
14 substantial likelihood of success on their LMRDA claim and issued
15 an injunction ordering that new ballots be prepared and a new
16 election conducted. On appeal, the United States Supreme Court
17 reversed, holding that the District Court should not have granted
18 preliminary relief. In its opinion, the Supreme Court
19 explained that the LMRDA contained two different Titles dealing
20 with the subject matter of union elections. Title I enacted a
21 Statutory "Bill of Rights" for union members protecting their
22 rights in union elections with enforcement and remedies available
23 in district courts. Title IV provides for post-election
24 procedures designed to protect free and democratic union elections
25 with primary enforcement responsibility delegated to the Secretary
26 of Labor. The Supreme Court noted that the enforcement mechanisms
27 established by these Titles were in apparent conflict and that
28 they would have to decide whether suits alleging Title I

1 violations could be properly heard by district courts during the
2 course of a union election. To resolve this issue the Supreme
3 Court noted that Congress had limited the judicial remedies that
4 could be awarded by district courts for violations of Title I to
5 cases where the relief was "appropriate." At the same time the
6 Supreme Court noted that Congress had clearly indicated its intent
7 to consolidate consideration of challenges to union elections with
8 the Secretary of Labor, and to rely on the Secretary's expertise
9 to supervise any new election should that be necessary. Moreover,
10 the Supreme Court cited Congressional testimony which described a
11 court as a "clumsy instrument" for supervising such an election.
12 See Testimony of Professor Archibald Cox, Senate Hearing on Labor-
13 Management Reform Legislation, 86th Cong. 1959. The Supreme Court
14 resolved the question it had posed by holding that: "we are
15 compelled to conclude that Congress did not consider court
16 supervision of union elections to be an 'appropriate' remedy for a
17 Title I suit filed during the course of a union election. § 102,
18 29 U.S.C. § 412." Id. at 546.

19 At the same time, the Supreme Court recognized that district
20 courts did have jurisdiction over Title I suits and that there may
21 be cases where Title I relief is appropriate when an election is
22 being conducted. The Supreme Court noted, however, that any such
23 case would be limited to "violations of Title I that are easily
24 remediable under that Title without substantially delaying or
25 invalidating an ongoing election." Id. at 546. The Supreme Court
26 explained that the district court is to consider the
27 appropriateness of the remedy required to eliminate the claimed
28 violation of Title I. District courts are instructed that "If the

1 remedy sought is invalidation of the election already being
2 conducted with court supervision of a new election, the union
3 members must utilize the remedies provided by Title IV." Id. at
4 550.

5 **C. Substantive LMRDA Violations**

6 Under 29 U.S.C. § 411(a)(2) of the LMRDA, union members are
7 protected against infringement of their free speech rights by
8 employers. To prove a violation of this section a plaintiff must
9 prove: (1) exercise of the right to oppose union leadership or
10 union policies, (2) subjection to retaliatory action, and (3) the
11 retaliatory action was a direct result of the decision to express
12 disagreement with union leadership or union policy. Casumpang v.
13 International Longshoremen's and Warehousemen's Union, Local 182,
14 269 F.3d 1042, 1058 (9th Cir. 2001).

15 29 U.S.C. § 529 of the LMRDA make it unlawful to "fine,
16 suspend, expel, or otherwise discipline" a union member for the
17 exercise of any right to which he or she is entitled. By using
18 the term, "otherwise discipline," "Congress did not intend to
19 include all acts that deterred their exercise of rights protected
20 under the LMRDA, but rather meant instead to denote only
21 punishment authorized by the union as a collective entity to
22 enforce its rules." Breining v. Sheet Metal Workers Intern.
23 Ass'n Local Union No. 6, 493 U.S. 67, 91 (1989). "Discipline" in
24 this statute refers to actions taken under the color of union
25 authority and implies action taken according to "some sort of
26 established disciplinary process rather than ad hoc retaliation by
27 individual union officers." Id. at 91-92.

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2 **III. DISCUSSION**

3 Plaintiff Jose Garcia has been a member of Local 1877 for 16
4 years. He filed nomination papers to run for a position as an
5 Executive Board member in the upcoming election. This application
6 was reviewed by the 2009 Election Committee of local 1877 on
7 September 11, 2009. This Election Committee consists of 7
8 persons. The chair was Victor Narro who was appointed by Local
9 1877 President Mike Garcia. The other members were elected to
10 their positions - 3 from Southern California, 3 from Northern
11 California. At the September 11, 2009 meeting, the Election
12 Committee considered the question of whether a candidate for an
13 Executive Board position should be disqualified if the application
14 filed did not identify the specific Board involved. The
15 importance of this information is that each Division throughout
16 the State has its own Board and its own constituency of voters.
17 The Election Committee decided by a vote of 4 to 3 that the
18 failure to identify the specific Board involved warranted
19 disqualification. As a result of this vote, Jose Garcia was found
20 to be disqualified because he had not identified the specific
21 Board he was running for. Garcia had identified his employer and
22 job site, but the Election Committee did not find this to be
23 information that saved him from disqualification. Garcia appealed
24 this decision, but there has been no decision on the appeal.

25 Garcia is not on the present October 29 election ballot. He
26 asks the Court to stop the scheduled election to decide that he
27 should not have been disqualified; to add him to a new ballot and
28 to conduct a new election in which he is a candidate. The first

1 issue for the Court in such a scenario is to consider his
2 likelihood of success on the merits of his LMRDA claim. Given the
3 criteria for LMRDA discipline violations, this conduct cannot be
4 the basis for an unlawful discipline violation and requires the
5 Court to consider it as a possible free speech violation under the
6 LMRDA. Garcia has established his free speech conduct relevant to
7 such a violation by evidence of his participation in a protest
8 demonstration against the incumbent leadership of Local 1877 on
9 February 14, 2009. There is, however, a factual question as to
10 whether the September 11 conduct of the Election Committee can be
11 considered to be retaliation caused by that exercise of Garcia's
12 free speech. The seven month gap between the speech conduct and
13 the asserted act of retaliation virtually eliminates any inference
14 that the events can be causally linked because of the significant
15 passage of time between them. As to the disqualification decision
16 itself, on the present evidence, it is not obvious that this
17 decision is objectively wrong. Additionally, the evidence before
18 the Court does not establish that this disqualification was
19 discriminatorily applied. As will be seen, there is evidence that
20 one other potential candidate, who was also an administration
21 dissident, was disqualified on this thesis, but there is no other
22 evidence as to how this ground for disqualification was used, or
23 if it was used, as to any other potential candidate for office.

24 On this evidence, then, Plaintiff Jose Garcia has not shown
25 that it is likely that he will succeed on the merits of his LMRDA
26 claim.

27 Plaintiff Argelio Cordova has been a member of Local 1877 for
28 10 years. He sought to be a candidate in the 2009 election for a

1 position as an Executive Board member. He was disqualified by the
2 Election Committee on September 11, 2009 on the same thesis as
3 Jose Garcia. The circumstances of his case are essentially the
4 same as for Garcia and the Court reaches the same conclusion - he
5 has not established a likelihood of success on the merits of his
6 LMRDA claim.

7 Plaintiff Amelia Medina has been a member of Local 1877 for
8 14 years. She also filed nomination papers to run for an
9 Executive Board position. She designated the specific Board she
10 was running for and was not disqualified on that ground. She was
11 disqualified, however, on another ground. When a candidate seeks
12 nomination the rules require that the prospective candidate must
13 file the signature of at least 50 members of the union who are
14 within the limited voting constituency for the office which is
15 sought and are in approval of their candidacy. The Election
16 Committee reviews these applications to confirm whether the
17 supporting signatories are valid voters. If the Election
18 Committee decides that a supporter is disqualified, that signature
19 is stricken. One obvious threshold circumstance that will result
20 in a name being stricken is the case where the signature is not
21 legible. If the Committee cannot recognize the name, it cannot be
22 confirmed, and it is therefore stricken. Another basis for
23 striking a name is a decision by the Election Committee that the
24 supporter is not in good standing with the union. To be in good
25 standing a person must be a member of the union and be fully paid
26 up as to any dues which must be paid. At the September 11, 2009
27 hearing of the Election Committee it was decided by a 4-3 vote
28 that whether or not a supporter was in good standing would be

1 determined by a review of their status as of the month of July
2 2009. If a member of the union was fully paid up on their dues as
3 of July 2009, they would be considered to be in good standing. If
4 they were not fully paid up in that month they would be considered
5 to be not in good standing and their name would be stricken.

6 Amelia Medina submitted an application with some 57
7 supporting signatures. Upon review, on September 11, 2009, the
8 Election Committee struck enough names to reduce her valid
9 supporting signatures to less than 50 and she was disqualified as
10 a candidate for that reason. The record does not show the reason
11 used by the Election Committee in striking any of the names.

12 Here again the issue for preliminary relief analysis is the
13 likelihood of success on the merits of this LMRDA claim. The
14 record would support a finding that this plaintiff was running as
15 one member of a group opposed to the incumbent administration, but
16 there is no showing as to any particular exercise of free speech
17 by Plaintiff. The decisive circumstances in this case are that:
18 there is no evidence as to why any specific name was stricken;
19 whether there is anything wrong with the use of the July 2009 time
20 period to ascertain good standing status; or, whether the decision
21 to strike the names of supporters which resulted in the
22 disqualification of the plaintiff can be linked in any way to any
23 exercise of free speech by the plaintiff. Under these
24 circumstances, the Court believes that Plaintiff Amelia Medina has
25 not established that it is likely that she will succeed on the
26 merits of her LMRDA claim.

27 Plaintiff Oscar Alonzo has been a member of Local 1877 for 7
28 years. He submitted an application to run for the office of

1 President of the union. He was disqualified by the Election
2 Committee on September 11, 2009 on the same grounds as Amelia
3 Medina - less than 50 valid supporters. The plaintiff says he was
4 told by an Election Committee member that some of the name of his
5 supporters were stricken because they were not in good standing,
6 but there is no evidence as to the reason used by the Election
7 Committee to strike any specific name. The other circumstances
8 surrounding the ultimate decision of the Election Committee to
9 disqualify this plaintiff are essentially the same as those
10 present in the case of Plaintiff Amelia Medina and, for the same
11 reasons, the Court decides that Plaintiff Oscar Alonzo has also
12 failed to show a likelihood of success on the merits of his LMRDA
13 claim.

14 Plaintiff John Gray has been a member of Local 1877 for two
15 years. He filed nomination papers to run for a position as an
16 Executive Board Member. On September 16, 2009 he was informed by
17 the Election Committee that he had been disqualified because he
18 was not in good standing in the Union. It appears that this
19 decision was based on a conclusion that Gray had failed to pay all
20 of the dues he was obligated to pay. Gray says this was not true
21 as he pays his dues by an automatic check off from his earnings
22 and that his employer is to notify the union of such payments. He
23 attaches copies of two pay stubs showing that there were dues
24 deductions in his pay checks for August 8, 2007 and September 2,
25 2009. At the hearing there was an argument by defense counsel
26 that there was a delinquency for past dues which had not been
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1 cured. There was also a response by Plaintiff's counsel
2 questioning that premise, and also arguing that any such problem
3 could be cured as part of the nomination process -- however, there
4 were no additional evidentiary submissions that would resolve the
5 factual issues attending the disqualification decision by the
6 Election Committee. In this situation there are clearly factual
7 issues to be resolved. In our context, where preliminary relief
8 is being requested, unresolved material questions of fact militate
9 against a finding that any likelihood of success on the merits has
10 been established. This Court finds that to be the case here -- it
11 cannot be said that the plaintiff has established any likelihood
12 of success on his LMRDA claim that the Election Commission
13 disqualification was a retaliation action caused by his exercise
14 of free speech rights.

17 Plaintiff Hector Rincon was employed by Local 1877 in June
18 2004 to work as an external organizer for them. He was a member
19 of another Union, the Building Service Staff Union (BSSU). In
20 March 2009 he became a member of Local 1877. On April 20, 2009 he
21 was called in by a Local 1877 official and presented with a
22 written "termination," informing him that he was being terminated
23 from SEIU Local 1877 over "work performance", which was further
24 described as engagement in "campaign activities against the
25 incumbent administrator." Local 1877 contends that this is a
26 perfectly proper termination inasmuch as Gray's duties were to be
27 a personal representative of the Local 1877 administration, and,
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1 in such circumstance, disloyalty is a proper ground for
2 termination. Gray's BSSU Union has filed a grievance concerning
3 this termination which is now being processed. Gray did not
4 submit nomination papers for any Local 1877 office in the 2009
5 election. He brings this law suit, however, on the premise that
6 he would have filed if he had known of certain activities by
7 Edward Sterns the President of SEIU. Those activities involve the
8 fact that there is a requirement for SEIU elections that any
9 candidate for a union office must have been a member of the union
10 in good standing for at least two years before the election. In
11 July 2009 Stern issued a waiver of the two year requirement for
12 the 2009 election. Gray believes that there should have been a
13 notice of this waiver, made in such a fashion that he would have
14 learned of the waiver, and that he would have filed for office
15 under such circumstances. At the hearing the Court inquired
16 whether or not Rincon actually remained as a member of the SEIU
17 Union after his "termination" on April 20, 2009. It turns out
18 that this is a matter of present dispute. Given this fundamental
19 factual question, and the completely unresolved issues of fact on
20 Rincon's claim that some failure to act by Local 1877 can be
21 considered to be an act of retaliation which was caused by his
22 exercise of free speech, the Court finds that Plaintiff Hector
23 Rincon has failed to establish that he is likely to prevail on his
24 LMRDA cause of action.
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1 Plaintiff Laura Plummer has been a member of Local 1877 for
2 16 years. She is the present Secretary - Treasurer of Local 1877,
3 and is running for that position again in the October 2009
4 election having been found to be a qualified candidate by the
5 Election Commission. She has been openly critical of the
6 incumbent administration. She has filed a declaration which
7 supports the issuance of a TRO because there has "not been a fair
8 and democratic nomination process." Additionally, she states that
9 she has been trying to get a copy of a list of union members to
10 which she is entitled by the Union constitution, but that she has
11 not been given such a list. This alleged conduct would be the
12 only basis for a finding of retaliatory conduct made by the union
13 against her. The declarations submitted on this issue raise
14 questions of fact: as to the nature of the request made by
15 Plaintiff; as to the circumstances of any response to her request
16 by Local 1877 officials; and as to any further action by the
17 plaintiff in light of Local 1877 responses. It may very well be
18 that Plaintiff will be able to establish that defendants conduct
19 in this matter constitutes a violation of the LMRDA by Local 1877,
20 but it does not appear at this stage that that result can be said
21 to be the likely result.

25 Plaintiff Doroteo Garcia has been a member of Local 1877 for
26 9 years. He is presently an Executive Board member. He is
27 running for the office of First Vice President in the October 2009
28 election. Although he is also openly opposed to the incumbent

1 administration, he has been found qualified to run by the Election
2 Committee. Similarly to Plaintiff Laura Plummer, Plaintiff
3 Dototeo Garcia declares that he supports a TRO because of the
4 "unfair and undemocratic nomination process." He also complains
5 that union organizers have been going to worksites soliciting
6 absentee ballots and using "the opportunity to make a 'pitch'" for
7 the incumbent slate. It is not entirely clear that he is alleging
8 that this conduct makes Local 1877 liable to him for an LMRDA
9 violation, but it is clear that there is no evidence offered to
10 support any such thesis. Under these circumstances, if it is
11 accepted that plaintiff Dototeo Garcia is in fact claiming that he
12 has been subjected to unlawful conduct under the LMRDA, Plaintiff
13 has not demonstrated that he is likely to succeed on any such
14 claim.
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16 17 **IV. CONCLUSION**

18 There are two separate and independent reasons for the Court
19 to deny this motion for preliminary relief.

20 The first is primarily factual -- the plaintiffs individually
21 and collectively have failed to establish that they are likely to
22 succeed on their LMRDA claims. This is, of course, not a finding
23 that the Defendants are likely to succeed when the claims are
24 ultimately resolved. It is simply a case where the present
25 factual context does not warrant the granting of preliminary
26 relief to the Plaintiffs. The Court further notes that this
27 disposition will put the parties where they should be, in a
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1 setting where the expertise of the Secretary of Labor can be
2 brought to bear and the issue whether a union member is in "good
3 standing" is a familiar subject matter.

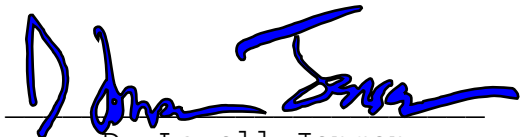
4 The second reason is primarily legal. This is a dispute
5 concerning a union election where the District Court should not
6 intervene. Pursuant to the direction of the United States Supreme
7 Court in Crowley, a District Court hearing a case under the LMRDA
8 which requests preliminary relief, is to consider the specific
9 remedy sought, and if that remedy requires "invalidation of the
10 election already being conducted with court supervision of a new
11 election", the Court is to refrain from any preliminary relief and
12 notify plaintiffs that they are to utilize the remedies provided
13 by Title IV. The District Court is to grant relief only in
14 "appropriate" cases and is not to intervene unless Title I
15 violations are easily remediable and there is no substantial
16 delay of an ongoing election.

17 In this case a union election is to take place on Thursday,
18 October 29th. A nomination process has been completed, hundreds
19 of candidates for some 44 offices throughout the state of
20 California have been qualified. Ballots for the election have
21 been printed, absentee ballots have been distributed, and absentee
22 voting has begun. Plaintiffs now ask the Court to order that the
23 election cannot be held, order the union to undertake a new
24 qualification process, order the qualification of new candidates,
25 order new ballots to be printed, and to designate the time for a
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1 new election. This is very clearly a case where there would be
2 substantial delay, invalidation of an on-going election, and Court
3 supervision of a new election. The Court finds that this is a
4 separate and sufficient ground to deny the motion.
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6 ACCORDINGLY, for the reasons stated, Plaintiffs motion for
7 preliminary relief is DENIED.

8 DATE:October 27, 2009



D. Lowell Jensen
United States District Judge

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