INDEPENDENT REVIEW BOARD
444 North Capitol Street, NW, Suite 528
Washington, DC 20001
(202) 434-8080
Facsimile (202) 434-8084
Corruption Hotline (800) CALL IRB

July 21, 2009

James P. Hoffa, General President
International Brotherhood Of Teamsters
25 Louisiana Avenue, NW
Washington, DC 20001

Re: Proposed Charges Against Local 726 Officers and Employee Pension Fund Trustees Thomas Clair, John Falzone and Michael Marcatante

Dear Mr. Hoffa:

Enclosed are the Independent Review Board's (IRB) report and accompanying exhibits concerning Local 726 Officers and Employee Pension Fund Trustees Thomas Clair, John Falzone and Michael Marcatante. This report is forwarded to you for appropriate action under Section G, paragraphs (d) and (e) of the March 14, 1989 Consent Order entered in United States v. IBT, 88 Civ. 4486 (S.D.N.Y.).

Upon review of the report, if you deem it appropriate, the charge under Article XIX of the IBT Constitution should be filed. You have ninety days within which to file the charge, hold a hearing and forward a final written report to the IRB. Pursuant to paragraph I(9) of the IRB Rules, not meeting this deadline may be considered a failure to cooperate with the IRB. A copy of the hearing transcript should be furnished to the IRB and to the Chief Investigator.

If you decide to reject the IRB's recommendation, you must provide a written explanation with the specific reasons for failing to accept. Within seven days of receipt of this letter, please inform the IRB of the actions planned.

Very truly yours,

Members of the
Independent Review Board

By: ______________________
John J. Cronin, Jr.
Administrator

Enclosures

cc: Members of the General Executive Board, w/o Exhibits
Bradley T. Raymond, Esq., w/Exhibits
Beth Goldman, AUSA, w/o Exhibits
Marvin Gittler, Esq., w/Exhibits
Thomas Clair, w/Exhibits
John Falzone, w/Exhibits
Michael Marcatante, w/Exhibits

To: James P. Hoffa, IBT General President

From: Members of the Independent Review Board

Date: July 21, 2009

Re: Proposed Charges against Local 726 Officers and Employee Pension Fund Trustees Thomas Clair, John Falzone, and Michael Marcatante

I. RECOMMENDATION

The Independent Review Board ("IRB") refers the below report to the IBT General President and recommends that Local 726 Secretary-Treasurer and Principal Officer Thomas Clair ("Clair"), President John Falzone ("Falzone"), and Local Trustee Michael Marcatante ("Marcatante"), full-time employees of Local 726, who were also Trustees of the Local 726 Employee Pension Plan ("Pension Fund"), be charged with breaching their fiduciary duties under the IBT Constitution by causing the Pension Fund to enter into two ERISA prohibited transactions totaling $125,000.00 and by failing to properly administer the Pension Fund.

As detailed below, by their conduct, it appears that Clair, Falzone and Marcatante brought reproach upon the IBT and breached their fiduciary duties in violation of Article

XIX, Section 7(b)(1) and (2) and Article II, Sections 2(b)(1), (2), and (6) of the IBT Constitution.[1]

It is also recommended that Local 726 principal officer Clair be charged with violating Section 14(A)(3) of the Local's Bylaws when, as discussed below, without the required Executive Board approval, he caused the Local to take and pledged the Local's assets to secure loans he and two other Local officers made to the Local to enable the Local to repay the amount of the two prohibited transactions to the Pension Fund. By this conduct, Clair appears to have violated Article XIX, Section 7(b)(1) of

---

1 Article II, Section 2(b) of the IBT Constitution entitled "Union Fiduciary's Code of Ethics" provides:

> [a]ny member who serves as a fiduciary of an employee benefit plan covering members or employees of the International or any of its subordinate bodies shall pledge to follow the following Code of Ethics with respect to his or her service as a fiduciary to the plan.
>
> * * *
>
> (1) The fiduciary shall faithfully serve the best interests of the participants and beneficiaries of the plan in accordance with the requirements of applicable law.
>
> (2) The fiduciary shall exercise his or her duties with respect to the plan with the care, skill, prudence, and diligence under the circumstances that a prudent person familiar with such matters would use acting under similar circumstances.
>
> * * *
>
> (6) The fiduciary shall take the reasonable steps, consistent with his or her obligations under applicable law, to ensure that all employers who are required to contribute to the plan under a collective bargaining agreement fully comply with their reporting and contribution obligations.

(Ex. 1)

the IBT Constitution and Section 14(A)(3) of the Local's Bylaws.

In addition, it is recommended that principal officer Clair be charged with bringing reproach upon the IBT by making misrepresentations and allowing misrepresentations to be made regarding Local 726 to IBT General Secretary-Treasurer C. Thomas Keegel ("Keegel"). By letter dated March 24, 2005, Clair advised Keegel that the Local was recording the liability under the Local's Severance Plan as the IBT had instructed Clair to do on at least three occasions. (Ex. 2; Ex. 70; Ex. 62; Ex. 63) Despite this written representation, the liability under the Severance Plan was not included on the Local's Statement of Assets and Liabilities as the IBT had instructed. (Exs. 7-10) As discussed below, after Keegel asked Joint Council 25 President John Coli ("Coli") to review the Local's operations and Coli met with Clair, in a letter dated May 14, 2008, Coli advised Keegel that the Local's officers and business agents had taken salary reductions effective April 1, 2008. (Ex. 3) Clair was copied on this letter. (Ex. 3) Clair admitted that no such salary reductions had taken place. (Ex. 4 at 86; Ex. 67) Clair did not contact Coli to correct Coli's letter. (Ex. 4 at 89; Ex. 67) Accordingly, it appears that Clair brought reproach upon the IBT by making and allowing misrepresentations to Keegel regarding the Local's financial practices in violation of Article XIX, Section 7(b)(1) and (2) of the IBT Constitution.

II. SUMMARY

Secretary-Treasurer and principal officer Clair, President Falzone and Local Trustee Marcatante are full-time employees of the Local. They were also Trustees of the Pension Fund. (Ex. 4 at 28-29; Ex. 18 at 38-39; Ex. 67) They breached their fiduciary duties under Article II, Section 2(b) of the IBT Constitution by causing the Pension Fund to transfer to the Local $125,000.00. As detailed below, transfers totaling $125,000.00 were prohibited transactions under ERISA since the Local was a party in interest to the Pension Fund. (Ex. 29) The Local was in debt to yet another pension fund which provided separate pension coverage for the officers and employees. It needed monies to pay off the debt. The three men, as officers of the Local, voted to borrow money from the Pension Fund and, as Pension Fund Trustees, allowed the money to be transferred to the Local without any terms for repayment. (Ex. 43; Ex. 4 at 45-47) Further evidencing the three officers' breach of their fiduciary duties, there were no documents, such as promissory notes, memorializing the loans. (Ex. 83) Indeed, there were no Pension Fund minutes reflecting the transfers. (Ex. 4 at 67; Ex. 67) Nor were any loan repayment terms set at the time of the transfers, such as interest or any schedule for or date for repayment. (Ex. 17 at 24-25; Ex. 4 at 45-47; Ex. 67)

In addition to causing the Pension Fund to engage in two transactions prohibited under ERISA and the IBT Constitution, the Pension Fund Trustees breached their fiduciary duties by failing to maintain proper records such as minutes or any other documentation of Trustees meetings. (Ex. 4 at 34-35; Ex. 18 at 46; Ex. 67) Indeed, in response to a subpoena, the Pension Fund was unable to provide copies of the Plan Document or Summary Plan Description. (Ex. 5; Ex. 30)[2] During his sworn examination, Clair, the Local's principal officer and a Trustee of the Pension Fund, testified that he had never seen the Plan Document or trust instrument creating the Pension Fund. (Ex. 4 at 30) In addition, as of April 30, 2009, the Local owed $119,422.00 in delinquent contributions to the Pension Fund. (Ex. 6)

---

[2] Upon application of the Chief Investigator on January 12, 2009, United States District Court Judge Loretta Preska issued a subpoena to the Pension Fund requiring the production of "[a]ll versions of the Plan Document in effect during any part of the period from January 2003 to the present" and "[a]ll versions of the Summary Plan Description in effect during any part of the period from January 2003 to the present." (Ex. 5)

As discussed below, it is also recommended that Local 726 principal officer Clair be charged with violating Section 14(A)(3) of the Local's Bylaws when, without the required Executive Board approval, he caused the Local to take and pledged the Local's assets to secure loans he and two other Local officers made to the Local to allow the Local to repay the Pension Fund the amount of the two prohibited transactions. (Exs. 64-66; Ex. 17 at 39; Ex. 15 at 43-44; Ex. 16 at 23)

In addition, as discussed below, Clair intentionally misled the IBT Secretary-Treasurer in connection with the Secretary-Treasurer's duties. After the IBT instructed Clair on at least three occasions to record the Local's liability under the Local's Severance Plan on the Local's Statement of Assets and Liabilities, on March 24, 2005, Clair wrote to IBT General Secretary-Treasurer Keegel stating that the Local was recording the severance liability on its Statement of Assets and Liabilities. (Ex. 70; Ex. 62; Ex. 63; Ex. 2) Despite Clair's explicit representation to Keegel, the Local was not recording the severance liability on its Statement of Assets and Liabilities. (Exs. 6-10)

In addition, in February 2008, based upon the Local's poor financial condition, Keegel asked Joint Council

President Coli to review the operations of Local 726. (Ex. 11) After Coli conducted the review and met with Clair, on May 14, 2008, Coli wrote a letter to Keegel setting forth the actions Clair had taken "to address the deteriorating situation." (Ex. 3) In this letter, which was copied to Clair, Coli stated,

> . . . Clair and his staff have made various reductions in their expenses. The reductions include:
>
> 1. Salary reductions for officers and business agents effective April 1, 2008. The move saves approximately $4,000/month

(Ex. 3) Clair admitted receiving a copy of this letter. (Ex. 4 at 85-86) He acknowledged that there were no salary reductions as Coli had written Clair had represented to Coli. (Ex. 4 at 86) Clair did not contact Coli or Keegel to correct the inaccurate information in Coli's May 14, 2008 letter to Keegel. (Ex. 4 at 89)

III. JURISDICTION

Pursuant to Article XIX, Section 14(c) of the IBT Constitution, this matter is within the jurisdiction of the IBT General President. Paragraph (G)(e) of the March 14, 1989 Consent Order in United States v. IBT, 88 Civ. 4486 (S.D.N.Y.) and Paragraph I (6) of the Rules and Procedures for Operation of the IRB ("IRB Rules") require that within

90 days of the IRB's referral of a matter to an IBT entity, that entity must file with the IRB written findings setting forth the specific action taken and the reasons for that action. Pursuant to Paragraph I(9) of the IRB Rules, not meeting this deadline may be considered a failure to cooperate with the IRB.

IV. INVESTIGATIVE FINDINGS

A. Background

Local 726 has approximately 3,773 members who are state and municipal employees in the Chicago area. (Ex. 13) As a union representing public employees, Local 726 is not required to file Forms LM-2 with the United States Department of Labor. The current Local 726 officers are: Secretary-Treasurer and principal officer Clair, President Falzone, Vice President Kenneth R. Brantley ("Brantley"), Recording Secretary John F. Hurley ("Hurley"), and Trustees Marcatante, Linda Cruz ("Cruz") and Anthony Fiori ("Fiori"). (Ex 4 at 5-6; Ex. 14 at 5-6; Ex. 15 at 5-6; Ex. 16 at 5-6; Ex. 17 at 5-6; Ex. 18 at 5; Ex. 19 at 5-7) All but Fiori and Cruz were full-time employees of the Local.

B. Local 726 Employee Pension Fund

Effective January 1, 1983, Local 726 created the Pension Fund. (Ex. 20 at 1) The Pension Fund covered all

Local 726 Employees. (Ex 20 at 1) This was in addition to the coverage they already had through the Central States Pension Fund. (Ex. 15 at 12) Pursuant to the Pension Fund's Trust Agreement, a board consisting of three Trustees appointed by the Local 726 Executive Board ("Fund Trustees") was to administer the Pension Fund.[3] (Ex. 20 at 2) According to Clair, since 2003, when the current Executive Board took office, Falzone, Marcatante, and Clair have been the three Fund Trustees. (Ex. 4 at 33-34, 28-29) Pursuant to the Trust Agreement, in administering the Pension Plan, the Fund Trustees were required to use "ordinary care" and "reasonable diligence" in carrying out their duties. (Ex. 20 at 3) In addition, the Fund Trustees were required to hold meetings and to maintain "accurate and detailed records and accounts of all properties held under this agreement and of all investments, receipts, disbursements, and other transactions hereunder." (Ex. 20 at 5)

As of December 31, 2007, the Pension Plan had 35 participants and projected Net Assets of $1,191,027. (Ex. 21; Ex. 22 at 6)

---

[3] The Trust Agreement defines the "Pension Committee" as "the person or persons appointed by the Employer to administer the Pension Plan in accordance with the provisions of the Pension Plan." (Ex. 20 at 2) Fund Trustees Clair and Marcatante testified that the Pension Fund did not have a Pension Committee. (Ex. 4 at 28-29; Ex. 18 at 46)

C. Trustees of the Local 726 Pension Fund

1. Thomas Clair

Clair joined Local 726 in 1971. (Ex. 4 at 5; Ex. 23) Clair has been employed at the Local since 1995, when he began as a business agent. (Ex. 4 at 6) Since 2003, Clair has been the Local's Secretary-Treasurer and principal officer. (Ex. 4 at 5-6)[4] Since 2003, Clair has been a Trustee of the Local 726 Pension Fund and the Plan Administrator. (Ex. 4 at 33; Ex. 21)

In 2008, Clair's salary from Local 726 was $136,590.86. (Ex. 4 at 6; Ex. 24)

2. John Falzone

Falzone joined Local 726 in 1982. (Ex. 15 at 4; Ex. 25)[5] Since 1995, Falzone has been the Local 726 President. (Ex. 15 at 5-6) In 2008, Falzone's salary from Local 726 was $118,903.07. (Ex. 15 at 5; Ex. 24)

In addition to his position on the Local's Executive Board, according to the other two Trustees and counsel for the Pension Fund, Falzone is a Pension Fund Trustee. (Ex. 18 at 38-39; Ex. 4 at 28-29, 33-34; Ex. 68) During his IRB sworn examination, Falzone testified that he was not a

---

[4] From 1997 to 2003, Clair had been the Local 726 Recording Secretary. (Ex. 4 at 5-6)

[5] Prior to becoming a member of Local 726, Falzone had been a member of Teamster Local 714. (Ex. 15 at 5)

Trustee of the Pension Fund and stated that he believed that the Pension Fund did not have Trustees. (Ex. 15 at 11-12) Contrary to Falzone's testimony, during their sworn examinations, Fund Trustees Clair and Marcatante both identified Falzone as a Trustee of the Pension Fund. (Ex. 4 at 28-29, 33-34; Ex. 18 at 38-39) Clair further testified that he and Falzone shared signatory authority over the Pension Fund. (Ex. 4 at 67) Further evidencing that Falzone was a Fund Trustee, he signed a Certificate of Corporate Resolution as a Fund Trustee in 2005. (Ex. 26) In addition, Falzone's name was listed, along with Clair's, as a "trustee or custodian" of the Pension Fund on the IRS Form 5500 the Pension Fund filed for 2005.[6] (Ex. 27) Moreover, in a letter dated May 26, 2009 to the Chief Investigator, the Pension Fund's attorney, Joel D'Alba identified Falzone as a Fund Trustee. (Ex. 68)[7]

3. Michael Marcatante

Marcatante became a member of Local 726 in 1978. (Ex. 18) In 1995, Marcatante was elected a Local Trustee. (Ex. 18 at 5; Ex. 4 at 9) He has been a business agent since

---

6 The IRS Form 5500s the Pension Fund filed after 2005 did not list the names of any trustees. (Ex. 21; Ex. 28)

7 In describing the Pension Fund's procedure for making investments, D'Alba's letter stated, "[t]he new investments would be approved by Mr. Marcatante, Thomas P. Clair and John Falzone, plan trustees. On the approval of these trustees, the purchases of new investments would be implemented. . ." (Ex. 68)

1996. (Ex. 18 at 6; Ex. 4 at 9) In addition to his position on the Executive Board, Marcatante is also a Pension Fund Trustee. (Ex. 18 at 38-39; Ex. 4 at 28-29)

In 2008, Marcatante's salary from Local 726 was $107,842.96. (Ex. 24)

D. The Pension Fund Trustees Violated the IBT Constitution

1. The Fund Trustees Breached Their Fiduciary Duties Under the IBT Constitution In Their Administration of the Pension Fund

As detailed below, Fund Trustees Clair, Marcatante, and Falzone did not perform their duties with the "care, skill, prudence, and diligence" the IBT Constitution and ERISA required. (Ex. 29; Ex. 1)[8] For example, in response to a subpoena, the Pension Fund was unable to produce the Plan Document establishing the Pension Fund or the Summary Plan Description. (Ex. 30; Ex. 5) In addition, the Fund

---

[8] Section 404(a)(1) of ERISA, 29 U.S.C.S. § 404(a)(1)provided the general fiduciary responsibility rules applicable to employee benefit plans under the statute, and stated in relevant part:

> Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -
>
> (A) For the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . (Ex. 29)

Trustees did not keep any minutes or other records of meetings. (Ex. 18 at 46; Ex. 4 at 34-35) It allegedly held informal meetings. (Ex. 18 at 46; Ex. 4 at 34-35) The Fund Trustees did not appear to understand their fiduciary obligations and gave inconsistent testimony on who had the authority to disburse Pension Fund money. (Ex. 4 at 67; Ex. 15 at 13)

Pursuant to a subpoena District Court Judge Loretta Preska ordered on January 12, 2009, the Pension Fund was required to produce all versions of the Plan Document and Summary Plan Description in effect since January 2003. (Ex. 5) Although ERISA required the Pension Fund to be administered in accordance with the instruments governing the plan[9], the Pension Fund was unable to produce the Plan Document or the Summary Plan Description for the Pension Fund. (Ex. 30)

Fund Trustee Clair testified that he had never seen the Trust Instrument or the Plan Document for the Pension Fund. (Ex. 4 at 30) Clair testified that he did not

---

[9] Section 404(a)(1)(D) of ERISA, 29 U.S.C.S. § 1104(a)(1)(D)states:

(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV. (Ex. 29) receive any documents when he became a Trustee of the Pension Fund. (Ex. 4 at 30-32) Moreover, Clair admitted that after becoming a Fund Trustee, he never attempted to locate the Trust Instrument or the Plan Document for the Pension Fund. (Ex. 4 at 32)

Fund Trustee Falzone testified that he first saw the Trust Instrument in 1995 when he took office as President, but that he never received a copy. (Ex. 15 at 8-9) Falzone testified that he kept a copy of the Plan Document in his desk at the Local. (Ex. 15 at 8-9) Fund Trustee Marcatante testified that he kept a copy of both the Trust Instrument and the Plan Document in his filing cabinet at the Local and that he provided the plan actuaries with copies of the Plan Document. (Ex. 18 at 40-41)

Although Fund Trustees Falzone and Marcatante claimed to have copies of the Plan Document, in response to the January 12, 2009 subpoena requiring the production of the Plan Document, the attorney for the Pension Fund wrote a letter to the Chief Investigator stating that the current officers never possessed any of the originating documents for the Pension Fund. (Ex. 30) In a letter copied to Clair, the attorney for the Pension Fund, wrote,

> . . . a search of the local union records and the records of the Pension Fund do not reveal any trust document establishing the Pension Fund. Originating

documents such as the trust agreement were not in the offices of the local union at the time the current officers assumed office. . .

(Ex. 30) The Chief Investigator obtained the trust agreement and Plan Document from the current and former Pension Fund actuaries pursuant to subpoenas. (Ex. 31; Ex. 32; Ex. 47; Ex. 20; Ex. 82)[10]

During his IRB sworn examination, Clair testified that he did not have any duties as a Trustee of the Pension Fund. (Ex. 4 at 29-30)[11] Clair further admitted that he was unfamiliar with ERISA and had never discussed his duties under ERISA with anyone. (Ex. 4 at 30)

During his IRB sworn examination, Falzone, whom the other Trustees identified as a Trustee of the Pension Fund and who signed a Certificate of Corporate Resolution as a Fund Trustee in 2005, denied holding any position with the Pension Fund. (Ex. 15 at 8; Ex. 26; Ex. 18 at 38-39; Ex. 4

---

10 The current actuary for the Pension Fund is Hartman & Associates Actuaries and Consultants and the former Pension Fund actuary was Howard Simon & Associates, Inc. (Ex. 4 at 36)

11 Clair testified as follows:

Q. What are your duties with respect to the 726 employee pension plan?
A. Well, we actually - we don't have any duties. What - the plan administrator is the one that administers it.
Q. As a trustee, do you understand you have any duties under the plan?
A. No.

(Ex. 4 at 29-30)

During his sworn examination, Clair, who was listed as the plan administrator on the 2007 Form 5500 the Pension Fund filed with the IRS, testified that the plan actuary, Hartman & Associates Actuaries and Consultants, was the plan administrator. (Ex. 4 at 29; Ex. 21) at 28-29) Moreover, Falzone testified that he did not think the Pension Fund had any Trustees at all. (Ex. 15 at 11-12) Fund Trustee Marcatante testified that his duties under ERISA as a Fund Trustee, were simply, "The fund has to be funded, and they can't make certain investments that would cause a liability to the fund." (Ex. 18 at 39-40)

Moreover, the Fund Trustees' testimony concerning who had authority to disburse funds from the Pension Fund was inconsistent. According to Clair, he and Falzone shared signatory authority over the Pension Fund. (Ex. 4 at 67) In contrast, Falzone testified that he did not know how funds were disbursed from the Pension Fund and stated that, as the Local's Secretary-Treasurer, Clair was "in charge of all the money." (Ex. 15 at 13) Falzone testified that Clair alone had authority to disburse funds and make investment decisions regarding the Pension Fund. (Ex. 15 at 13) Marcatante testified that the three Trustees made investment decisions together based on the advice of Eric Fudula ("Fudula"), an employee of the Bank of America Investment Services, who acted as financial advisor to the Pension Fund. (Ex. 18 at 39, 73) Marcatante testified that upon receiving advice from Fudula, the Fund Trustees,

> [w]ould meet, talk among ourselves and just call him [Fudula] back and say, "Go ahead and do it."

> And then he would make all the financial arrangements and make the changes.

(Ex. 18 at 73) Marcatante admitted that there were no documents memorializing any discussions and authorizations for any Pension Fund investments. (Ex. 18 at 69-72)

In addition, the Fund Trustees failed to hold documented meetings. (Ex. 18 at 46) Although Clair testified that the Board of Trustees met approximately once or twice a year (Ex. 4 at 34), Fund Trustees Marcatante and Clair acknowledged that such meetings were not memorialized in any way. (Ex. 4 at 34; Ex. 18 at 46) Clair further acknowledged that the Board of Trustees did not maintain any records. (Ex. 4 at 35)

Moreover, in apparent violation of Article II, Section 2(b)(6) of the IBT Constitution, the Fund Trustees failed to ensure that contributions were timely made and the Pension Fund met minimum funding requirements. (Ex. 1; Exs. 71-76; Ex. 12; Exs. 34-35) For example, in 2005, Local 726 did not make any employer contributions to the Pension Fund. (Ex. 33; Exs. 71-76; Ex. 12) In 2007, the plan was underfunded. (Exs. 34-35)[12] On February 13, 2009, Pension Fund actuary Thomas Hartman wrote a letter addressed to the

[12] From documents the actuary produced, it appears that contributions the Local made in 2006 were credited to plan year 2005 and contributions made in 2007 were credited to the 2006 plan year. (Ex. 33)

Pension Committee, which stated that the Local was required to contribute $119,422.00 for the plan year ending December 31, 2007 and requested that the Local "forward any payments made for the 2007 plan year." (Ex. 34)

An $119,422.00 liability to the Pension Fund first appeared on the December 2008 Trustee Report, which was prepared in February 2009. (Ex. 7) As of April 2009, the $119,422.00 liability to the Pension Fund remained on the Trustee Report. (Ex. 6)[13]

Indeed, on October 14, 2008, Local 726 paid a $1,192.00 fine to the IRS for failure to meet minimum funding standards for the Pension Fund in 2007. (Exs. 35-36) In addition, the Local paid a $163.00 tax on the ERISA prohibited transactions which are discussed below. (Exs. 35-36) By check dated October 14, 2008, Local 726 paid the fine and tax, totaling $1,355.00. (Ex. 36) During his sworn examination, Local 726 Secretary-Treasurer and Fund Trustee Clair testified that he was unaware of the fine and tax. (Ex. 4 at 52-53)[14]

---

[13] The April 2009 Trustee Report inaccurately listed the $119,422.00 owed to the Pension Plan as a negative liability. (Ex. 6)

[14] Contrary to Clair's testimony that he was unaware of the fine resulting from the prohibited transactions, Clair was copied on a memorandum from Pension Fund actuary Thomas Hartman which detailed the penalties that may be imposed as a result of the prohibited transaction. (Ex. 4 at 52-53; Ex. 37)

2. The Fund Trustees Violated Section 406(a)(1)(B) of ERISA by Causing the Pension Fund to Enter Into Two Prohibited Transactions Totaling $125,000.00

In addition to their breach of fiduciary duties in the administration of the Pension Fund, the Fund Trustees also violated their fiduciary duties under the IBT Constitution when they caused the Pension Fund to engage in two ERISA prohibited transactions in which the Pension Fund transferred to the Local a total of $125,000.00. (Ex. 1; Ex. 29) Moreover, in addition to causing the Pension Fund to engage in two prohibited transactions, the Fund Trustees breached their duties to act in the best interests of the plan participants when they failed to require any promissory note or other documentation of the loans, failed to set any loan repayment terms, such as a date by which repayment of the loans must be made or a schedule of repayment and a rate of interest. (Ex. 4 at 45-47)

Between October and December 2007, the Pension Fund transferred to Local 726 a total of $125,000.00. (Ex. 4 at 47-48; Ex. 38) These were prohibited transactions under ERISA. Section 406(a)(1)(B) of ERISA, 29 U.S.C.S. § 1106(a)(1)(B), prohibited plan fiduciaries from causing the plan to engage in transactions that the fiduciaries know or should know constitute the lending of money between the plan and a party in interest. (Ex. 29)[15] Under Section 3(14)(C) and (D) of ERISA, 29 U.S.C.S. § 1002(14)(C), 29 U.S.C.S. § 1002(14)(D), a "party in interest" included an employer any of whose employees are covered by an ERISA benefit plan and an employee organization any of whose members are covered by the plan. (Ex. 29) Accordingly, Local 726 was a party in interest to the Pension Fund.

On August 7, 2007, the Local entered into an agreement with the Central States Health and Welfare and Pension Funds ("Central States Funds") pursuant to which the Local agreed to pay $216,597.09 in delinquent contributions owed to the Central States Funds. (Ex. 39)[16] On October 19,

---

[15] Section 406(a)(1)(B) of ERISA, 29 U.S.C.S. § 406(a)(1)(B) provides:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect
>
> * * *
>
> (B) lending of money or other extension of credit between the plan and a party in interest.

(Ex. 29)

[16] The Local contributed to the Central States Funds on behalf of its employees. (Ex. 15 at 12) After receiving an anonymous letter from a Local 726 employee, on February 5, 2007 and April 17, 2007, the Central States Fund audited Local 726's contributions for the period of 2003 to 2006. (Ex. 40) On May 9, 2007, in a letter addressed to then Local 726 office manager Cari Lamberg and copied to Clair, the Central States Funds informed Local 726 of its preliminary finding that Local 726 owed $302,631.30 in contributions because the Local had reported inaccurate activation and termination dates for certain employees and had failed to report a number of eligible employees, including part-time employees to the Funds. (Ex. 41) On August 1, 2007, the Central States Funds notified Local 726 that the audit disclosed that Local 726 owed $166,201.92 to the Pension Fund and $50,395.17 to the Health and Welfare Fund. (Ex. 39) The Central States Funds requested Local 726 to "send a check immediately to cover the above amounts." (Ex. 39) On August 8, 2007, the Central States Funds confirmed a settlement of

2007, more than two months after Local 726 reached this agreement with the Central States Funds, Clair called a Special Emergency Local Executive Board Meeting to discuss the Local's financial condition and the amount owed to the Central States Funds. (Ex. 43; Ex. 4 at 44)

According to the minutes of the Special Emergency Executive Board meeting, in order to make the payments owed to the Central States Funds, the Local's Executive Board approved borrowing $125,000.00 from the Pension Fund, $70,0000.00 to be transferred immediately and the remaining $55,000.00 to be transferred at a later date pending future expenses. (Ex. 43) On October 23, 2007, at Clair's direction, former Local 726 office manager Cari Lamberg ("Lamberg") wire transferred $70,000.00 from the Pension Fund to Local 726's General Fund. (Ex. 4 at 47-48) There were no Pension Fund documents authorizing this transfer or its terms. (Ex. 83) On December 21, 2007, again at Clair's direction, Lamberg wire transferred $55,000.00 from the Pension Fund to the Local's General Fund. (Ex. 4 at 48-49) As a result of these two undocumented transfers, between October 23, 2007 and December 21, 2007, the Pension Fund transferred to the Local a total of $125,000.00. (Ex. 38)

$216,597.09 for full payment of all audit findings and interest related to their audit. (Ex. 42)

There was no documentation establishing that the Fund Trustees met to determine whether the transfers were in the best interest of the Pension Fund participants. (Ex. 4 at 66-67) No Pension Fund documents discussed the Pension Fund loaning the $125,000.00 to the Local. (Ex. 83; Ex. 4 at 66-67) As Local Executive Board members, all three Fund Trustees attended the October 19, 2007 Local Special Emergency Executive Board meeting during which the Local approved taking the loans from the Pension Fund. (Ex. 43) No terms of any such loans were discussed including a rate of interest and a repayment schedule. (Ex. 43; Ex. 4 at 45-47; Ex. 17 at 24-25; Ex. 49) The interest of Local 726, as borrower, was adverse to the interest of the Pension Fund as lender. As such, ERISA prohibited the plan fiduciaries from approving a loan. (Ex. 29)[17]

Clair claimed that the three Fund Trustees met to discuss "what was going to happen or how we could do it." (Ex. 4 at 66-67) There were no minutes of any such meeting. (Ex. 4 at 67) Despite Clair's testimony that the Fund Trustees independently discussed the loan, Falzone

---

[17] Section 406(b)(2) of ERISA, 29 U.S.C.S. § 1106(b)(2) provided:

> [T]ransactions between plan and fiduciary. A fiduciary with respect to a plan shall not
>
> * * *
>
> (2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of its participants or beneficiaries; (Ex. 29)

testified that he was "not sure" of the purpose of the loan and further testified that he "was really not directly involved in some of these transactions." (Ex. 15 at 21, 27; Ex. 4 at 67) When asked if the Pension Fund approved the loan, Fund Trustee Falzone, who denied holding a position with the Pension Fund, answered, "I don't think the pension - well, they must have, they gave it to us." (Ex. 15 at 17) Nowhere in Local or Pension Fund records were there any contemporaneous documents setting any terms for the alleged loans. Given the inconsistent testimony and the lack of any documented meetings, it does not appear that the Fund Trustees met independent of the Local's Executive Board to approve the loans and determine whether the loans benefited the plan participants. In any event, given the naked transfer of money from the Pension Fund to the Local, it is clear that the interests of the Pension Fund were not acted on by the Trustees.

The Pension Fund loans totaling $125,000.00 were undocumented. (Ex. 83) The loans were not memorialized by any promissory notes. (Ex. 83) There was no date set for repayment nor was any interest required. (Ex. 43; Ex. 4 at 46; Ex. 17 at 25) Moreover, the loans were not secured. (Ex. 83; Ex. 43) During the October 19, 2007 Special Emergency Executive Board meeting, the three Fund Trustees, who were also Executive Board members, did not require the Local to agree to any terms governing repayment. (Ex. 43; Ex. 15 at 24-25; Ex. 4 at 46)

The loans themselves were improper. The Fund Trustees' failure to require that the Local agree to any repayment terms or to pay interest or to require Local 726 to guarantee the loans aggravate their failure to act in the interests of the Pension Fund participants. Significantly when, as discussed below, Trustees Clair and Marcatante made personal loans to the Local in order to allow it to repay the prohibited transactions, Clair and Marcatante received promissory notes for the loans, a repayment schedule and interest. (Ex. 64; Ex. 66) Moreover, their loans were secured by Local assets. (Ex. 64; Ex. 66)

The Fund Trustees did not seek the advice of an accountant, attorney, or actuary regarding the loans totaling $125,000.00. (Ex. 4 at 64-66) Instead, former Local 726 office manager Lamberg reportedly spoke to an employee of the Bank of America, where the Local had its checking account, who allegedly told Lamberg that it would be permissible for the Pension Fund to loan money to the Local. (Ex. 15 at 14-15; Ex. 4 at 64-66) Before approving the loan, no Fund Trustee spoke to any Bank of America representative or other professional regarding the legality of the loan. (Ex. 4 at 64-66) Although the Fund Trustees regularly dealt with Fudula, an employee of the Bank of America Investment Services, who acted as a financial advisor to the Pension Fund, they failed to contact him about the loan. (Ex. 18 at 45-46; Ex. 4 at 64-66) Instead, the Fund Trustees claimed to have relied solely on a conversation that Local office manager Lamberg allegedly had with an employee of the Bank of America who was not an advisor to the Pension Fund and had never dealt with the Pension Fund before. (Ex. 4 at 64-66, 96-97; Ex. 18 at 57-58) Lamberg was not a Pension Fund employee and had no decision making authority over the Pension Fund. (Ex. 4 at 96-97; Ex. 15 at 14-15)

E. Clair Violated the Local's Bylaws When He Pledged the Local's Assets as Security for the Officers' Personal Loans Without the Executive Board Approval the Bylaws Required

Following an annual audit of Local 726 in March 2008, accountant James Giemzik of Legacy Professionals LLP told Clair that the loans from the Pension Fund to the Local were prohibited transactions that had to be repaid. (Ex. 4 at 49; Ex. 44 at 17-19) On March 19, 2008, following a conversation he had with Clair, Pension Fund actuary Hartman sent a letter to Clair, which stated that in order to repay the prohibited transactions and prevent the Local from incurring further fines, Local 726 had to repay the loans from the Pension Fund in the amount of $111,047.02, which included interest. (Ex. 45)[18]

Section 14(A)(3) of Local 726's Bylaws provided that the Executive Board is empowered to:

> (3) Loan and borrow monies directly and indirectly for such purposes and with such security, if any, as it deems appropriate, and with such arrangements for repayment as it deems appropriate - all to the extent provided by law. (Ex. 48)

Without Executive Board approval, Clair had the Local borrow money from three officers to repay the Pension Fund. (Ex. 17 at 38-39; Ex. 43) There was no approval in the Executive Board minutes for the Local borrowing this money. (Ex. 43) Moreover, Clair pledged Local 726's assets to secure the repayment of the loans he and two other Local 726 officers made. (Exs. 64-66) This was more security than ever extended to the Pension Fund. The Local's Bylaws did not authorize Clair to pledge the Local's assets without Executive Board approval. (Ex. 48)

---

[18] On October 31, 2007, Local 726 issued check number 041886, to the Local 726 Pension Plan in the amount of $17,000.00. (Ex. 46) The check voucher read "Local 726 Pension (11,000 + 5,000 repay)." (Ex. 46) Pension Fund actuary Hartman credited this full $17,000.00 payment toward the loan although the check voucher stated "5,000.00 repay". (Ex. 45; Ex. 46)

After receiving Hartman's letter concerning repayment of the two loans the Pension Fund had made to the Local, Clair, Marcatante and Local 726 Recording Secretary Hurley made loans to the Local totaling $112,000.00.[19] (Exs. 64-66) On behalf of the Local, Clair, as the Local's Secretary-Treasurer, signed three Promissory Notes, including one to himself, wherein the Local agreed to repay each of the officers the amount of his loan plus interest of 5.25 percent. (Exs. 64-66) The promissory notes included a payment schedule the Local was required to follow and provided that the loans would be repaid by March 25, 2011. (Exs. 64-66)[20] The Executive Board did not approve these loans as the Bylaws required. (Ex 48; Ex. 50; Ex. 19 at 46; Ex. 15 at 43-44; Ex. 14 at 30; Ex. 16 at 23) Moreover, without the required Executive Board approval, on March 21 and March 27, 2008, Clair irrevocably pledged Local 726's

[19] Clair lent the Local $45,000, Marcatante $40,000 and Hurley $27,000. (Exs. 64-66) In order to make their loans, Clair and Marcatante borrowed from their 401K accounts. (Ex. 4 at 56; Ex. 18 at 63)

[20] Although the promissory notes Clair signed required the Local to make specific weekly payments on the three loans, Marcatante testified that the Local has not timely paid the principal and interest due to him each month. (Ex. 18 at 66-67) He testified,

> [b]ecause of the financial straits that we are in right now, I told the Local that just pay me when we get back on your own feet and financially stable, and I really didn't care when the time frame was on it.

(Ex. 18 at 67)

Marcatante testified that as of June 2009, the Local had paid him "probably under $1,000.00." (Ex. 18 at 67) assets in order to secure each of the three loans, including his. (Exs. 64-66; Ex. 17 at 39; Ex. 15 at 43-44) Clair's irrevocable pledges, one of which benefited Clair himself, also violated the Local's Bylaws. (Ex. 48)

Following its receipt of these loans from the officers, on March 27, 2008, Local 726 repaid the Pension Fund $111,174.85, the total amount the actuary calculated was due on the loans, as of March 27, 2008, including interest. (Ex. 45; Ex. 69)

F. Clair Brought Reproach Upon the IBT When He Misrepresented and Allowed Misrepresentations to be Made to the IBT General Secretary-Treasurer

As discussed below, by letter dated March 24, 2005, Clair misrepresented to the IBT General Secretary-Treasurer that the Local was complying with the IBT's instructions to record the liability for its Severance Plan on the Local's Statement of Assets and Liabilities. (Ex. 2) In addition, Clair did not correct the misstatement regarding salary reductions taken at the Local in a letter Coli sent to the General Secretary-Treasurer based on a representation Clair made and which letter Clair received. (Ex. 3; Ex. 4 at 89)

1. Clair's Misrepresentation to the IBT

Local 726 has a Severance Plan for all officers, business agents and clerical employees. (Ex. 51)[21] Pursuant to the Severance Plan, such individuals would receive between two and six weeks severance pay upon termination from the Local for any reason "other than discharge for cause and voluntary resignation." (Ex. 51) As of December 2008, the severance liability was approximately $69,582.09. (Ex. 52)[22] The Local omitted the severance liability from

---

[21] Pursuant to the plan, Local employees who had 15 or more years of service in the public sector prior to their Local employment would be credited with 15 years of service upon employment at the Local, and, upon "termination from employment due to retirement, layoff or for any reasons other than discharge for cause and voluntary resignation," would be entitled to severance pay according to the following schedule:

15-20 years of service = five weeks severance pay
20-25 years of service = six weeks severance pay

The plan further stated that any permanent employee who did not have 15 years of public service prior to being employed at the Local would receive severance based upon the following schedule:

1-5	years of service = two weeks severance pay
5-10	years of service = three weeks severance pay
10-15	years of service = four weeks severance pay
15-20	years of service = five weeks severance pay
20-25	years of service = six weeks severance pay

(Ex. 51)

[22] As of December 31, 2006, the Local's severance liability for the Local's officers and business agents was approximately $68,591.53. (Ex. 23; Ex. 25; Exs. 52-60; Ex. 4 at 5-6; Ex. 15 at 5-6; Ex. 16 at 5-6; Ex. 17 at 5-6; Ex. 18 at 5-6) As of December 31, 2007, the severance liability for the officers and business agents was approximately $70,649.25. (Ex. 23; Ex. 25; Exs. 52-60; Ex. 4 at 5-6; Ex. 15 at 5-6; Ex. 16 at 5-6; Ex. 17 at 5-6; Ex. 18 at 5-6) These figures included the severance obligation for all full-time officers and Business Agents currently entitled to severance. These figures did not include Business Agent William McTighe because his start of employment date could not be determined.

the Trustee Reports despite specific instructions from the IBT to include it. (Exs. 6-10; Ex. 62)[23]

In 2004, the IBT conducted an audit of Local 726. (Ex. 63) In his audit report, the IBT auditor stated, "specific instructions were given to the Local union to record the accrued severance on the Statement of Assets as an obligation." (Ex. 63)

On October 29, 2004, IBT General Secretary-Treasurer Keegel sent a letter to Clair which stated, among other things, that the IBT's auditor had instructed the Local to record accrued vacation and accrued severance as obligations on the Local's Statement of Assets. (Ex. 70) Keegel instructed Clair to advise the IBT what steps the Local had taken in response to the auditor's instructions. (Ex. 70) Clair, who admitted that he received this letter, did not respond to Keegel's letter. (Ex. 4 at 70)

When Local 726 did not respond to Keegel's October 29, 2004 letter, Keegel sent another letter to Clair, dated

---

[23] During his sworn IRB examination, Local 726 accountant Giemzik testified regarding Local 726's failure to record the Local's total severance obligation on its financial statements. In relevant part, Giemzik testified:

Q. . . .My question is: Why would you put a number in for vacation and not severance?

A. Because, again, vacation is a true amount that they may owe the individual when that individual leaves for whatever reason, whereas the severance, you again have to qualify, you have to cease employment for any reason other than discharge for cause.

(Ex. 44 at 13)

February 23, 2005, which stated that since the Local had not responded to the IBT's previous letter, the IBT was sending an International Auditor to the Local to determine whether the Local had complied with the instructions detailed in the IBT's October 29, 2004 letter. (Ex. 61)

By letter dated March 9, 2005, IBT auditor Ed Pratt reported to the General Secretary-Treasurer that the Local was not in compliance with the IBT's instructions regarding, among other things, recording the accrued severance and accrued vacation as obligations on the Statement of Assets. (Ex. 62) In this letter, IBT auditor Pratt stated that he had instructed Clair to "attend to these matters immediately and to respond to the office of the General Secretary Treasurer on each singular item as they are fixed." (Ex. 62) On March 24, 2005, Clair sent a letter to Keegel stating, "Statement of Assets - Severance Local 726 has verified the start dates of each employee and has calculated the number of years of service to date. It is currently being recorded as an obligation to the Statement of Assets and Liabilities." (Ex. 2) This assertion was false.[24]

[24] In addition, Clair made a similar misrepresentation that the Local's vacation liability was being included on the Statement of Assets as the IBT had instructed. (Ex. 2) This also was not done. (Exs. 6-10)

Contrary to the IBT's specific instructions and Clair's written representation that the Local was following such instructions, the Local 726 Trustee Reports for the period from March 2005 to the present did not include accrued vacation and severance as liabilities on the Statement of Assets and Liabilities. (Exs. 6-10) Despite his deliberate representation to the contrary to the IBT, during his June 17, 2009 IRB sworn examination, Clair testified that he did not know if the accrued vacation and severance liabilities were recorded on the Statement of Assets and Liabilities on the Trustee Reports. (Ex. 4 at 72-73)

2. Clair's Failure to Correct the Inaccuracy in Coli's Letter to Keegel

By letter dated February 22, 2008, General Secretary-Treasurer Keegel sent a letter to Joint Council 25 President Coli asking the Joint Council to conduct a review of the operations of Local 726. (Ex. 11) Keegel's letter referenced the Local's November 2007 Trustee Report which stated that the Local's General Checking Account had a negative balance of $205,022.00. and that the Local showed negative $70,000.00 "in an account identified as Local 726

Pension." (Ex. 8; Ex. 11)[25] Clair received a copy of Keegel's letter. He stated that as a result of Keegel's request, Joint Council 25 conducted a review of Local 726's operations. (Ex. 4 at 84-85)

After the review, on May 14, 2008, Coli sent a letter to General Secretary-Treasurer Keegel stating that, "Clair has taken numerous steps to address the deteriorating situation." (Ex. 3) In this letter, Coli told General Secretary-Treasurer Keegel that, as one of these measures, Local 726 had reduced the salaries of its officers and business agents by approximately $4,000.00 in total per month effective April 1, 2008. (Ex. 3) Clair was copied on Coli's letter and acknowledged receiving it. (Ex. 4 at 85-86; Ex. 3)

Contrary to the information conveyed in this letter, the Local's payroll records for 2008 did not reflect any salary reductions for the officers and business agents. (Ex. 60) Clair acknowledged that, contrary to the statements in Coli's letter, the salaries of the Local's officers and business agents were not reduced at all. (Ex.

[25] This $70,000.00, which was included on the November 2007 Trustee Report as a negative asset, appears to have been the first improper loan from the Pension Fund to the Local. (Ex. 8)

4 at 86)[26] After receiving Coli's letter containing the incorrect statement about Local 726 salary reductions, Clair did not correct the letter. (Ex. 4 at 89) This was at least the second time Clair explicitly misled the IBT about steps he was taking at the Local.

V. LEGAL ANALYSIS

A. The Fund Trustees Violated the IBT Constitution

The Fund Trustees breached the "Union Fiduciary Code of Ethics" detailed in Article II, Section 2(b) of the IBT Constitution and their general duty of prudence under ERISA by their failure to properly administer the Pension Fund. (Ex. 1; Ex. 29) Article II, Section II(b) of the IBT Constitution required the Trustees to administer the fund "with the care, skill, prudence, and diligence under the circumstances that a prudent person familiar with such matters would use acting under similar circumstances." (Ex. 1) The Fund Trustees' failure to hold formal meetings, keep written minutes or any records concerning Pension Fund

[26] Coli's May 14, 2008 letter also indicated that Local 726 had already made staff reductions, including the termination of one staff attorney and one administrative staff member that would save the Local $8,000.00 per month. Local 726 did eventually make these reductions. (Ex. 4 at 86-87; Ex. 77; Ex. 78; Ex. 79; Ex. 80) For example, two months after Coli's letter represented that staff reductions had been made, administrative staff member and Secretary-Treasurer Clair's daughter, Jaclyn Clair, was fired because the Executive Board discovered that she had embezzled funds from Local 726. (Ex. 16 at 33-36; Ex. 81) Local 726 filed a police report as a result of Jaclyn Clair's embezzlement. (Ex. 16 at 35-36)

activities was evidence of their failure to prudently administer the Pension Fund. As was the transfer without any agreement as to terms of $125,000 from the Pension Fund to the Local.

In addition, the Fund Trustees breached their fiduciary duties when they caused the Pension Fund to enter into two ERISA prohibited transactions. A prohibited transaction under ERISA Section 406 (a)(1), 29 U.S.C.S. § 406(a)(1) occurs if a "fiduciary" has caused the plan to engage in the transaction with a "party in interest." (Ex. 29) Section 3(21)(A) of ERISA, 29 U.S.C.S. § 1002(21)(A), defined a fiduciary as someone who "exercises any discretionary authority or discretionary control respecting management of such plan" or "exercises any authority or control respecting management or disposition of its assets." (Ex. 29)[27]

Accordingly, as Trustees of the Pension Fund, Clair, Falzone and Marcatante, were plan fiduciaries. The two

[27] Section 3(21)(A) of ERISA, 29 U.S.C.S. § 1002(21)(A), provided:

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent
(i) he exercises any discretionary authority or disposition of its assets,

* * *

(iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section405(c)(1)(B), 29 U.S.C.S. § 1105 (c)(1)(B) loans totaling $125,000.00 from the Pension Fund to Local 726, a party in interest to the Pension Fund, constituted prohibited transactions under ERISA.

In addition, when, as Executive Board members, they approved the loan from the Pension Fund during the October 19, 2007 Special Emergency Executive Board meeting, the Fund Trustees violated Section 406(b)(2) of ERISA, 29 U.S.C.S. § 1106(b)(2) which prohibited fiduciaries from acting on behalf of an adverse party in a transaction involving the plan. When the Pension Fund loaned the Local a total of $125,000.00, the Local, as borrower, was an adverse party to the Pension Fund, as lender. While ERISA did not prohibit the Fund Trustees from holding Executive Board positions, ERISA required that when acting in his or her capacity as an ERISA fiduciary, an individual must act with "an eye single" to the interests of the participants and beneficiaries under the plan. See, Donovan v. Bierwirth, 680 F.2d 263, 271 (2d Cir. 1982) (Friendly, J.) That the Pension Fund Trustees approved the loan during an Executive Board meeting and failed to hold their own meeting to determine whether the loan benefited the Pension Fund participants, showed they were acting on behalf of the Local, an adverse party to the Pension Fund, and not in the interests of the participants and beneficiaries of the Pension Fund.

Moreover, the Fund Trustees' failure to require any documentation of the loan, including any promissory notes or repayment terms for the loans violated ERISA's general fiduciary responsibility requirements, which required fiduciaries of a plan to act with care, prudence and diligence under the circumstances. That is, if a reasonably prudent lender or agent of a lender, when making a loan to the Local, under circumstances similar to the circumstances that existed when the Fund Trustees caused the Pension Fund to loan $125,000 to the Local, would have required promissory notes, security for the loans, and repayment terms including interest, then the fiduciary rules of ERISA would require the Fund Trustees in this case to impose the same requirements on the Local. The Fund Trustees approved the Pension Fund loans during a Special Emergency Local Executive Board Meeting that Clair called because of the "financial crunch" the Local was experiencing. (Ex. 4 at 44) Given the Local's financial condition, a reasonably prudent lender clearly would have required promissory notes, security, interest and repayment terms for the loans totaling $125,000.

Moreover, in March 2008, Fund Trustees Clair and Marcatante made loans to the local totaling $85,000.00. (Exs. 65-66) While he as Fund Trustee did not require any documentation of the Pension Fund loans to the Local, Clair signed promissory notes with irrevocable pledges of the Local's assets in order to guarantee the loans that he and others made.[28] That Clair and Marcatante required promissory notes with terms of repayment, including interest, and pledges of collateral for their loans to the Local, but not the loans the Pension Fund made to the Local further demonstrated their failure to act with the care and prudence ERISA and the IBT Constitution required when they approved the Pension Fund loans.

VI. Proposed Charges

Based upon the foregoing, it is recommended that Thomas Clair, John Falzone, and Michael Marcatante be charged as follows:

A. Thomas Clair

1. Charge One

While a Local 726 officer and Trustee of the Local 726 Employee Pension Fund, you brought reproach upon the IBT

---

[28] Clair lent the Local $45,000 and Marcatante lent the Local $40,000.00. (Ex. 64; Ex. 66) In addition to these loans, Recording Secretary Hurley lent the Local $27,000.00. (Ex. 65) Clair signed promissory notes and irrevocable pledges that guaranteed all three loans. (Exs. 64-66)

and violated your fiduciary duties in violation of Article XIX, Section 7(b)(1) and (2) and Article II, Section 2(b)(1), (2), and (6) of the IBT Constitution, to wit:

While an officer of Local 726 and a Trustee of the Local 726 Employee Pension Fund, in 2007 you caused the Pension Fund to enter into two ERISA prohibited transactions totaling $125,000.00. When you approved the loan from the Pension Fund as an Executive Board member, you violated your duties under ERISA by acting on behalf of an adverse party in a transaction involving the Pension Fund. You did not set any terms for the alleged loans the Pension Fund made to the Local including any repayment schedule and rate of interest. In addition, you made the loans without receiving any security for repayment or even a promissory note. In addition, you failed to hold documented meetings or maintain any records of Pension Fund activities. You failed to administer the plan in accordance with plan documents and for the benefit of the members as ERISA and the IBT Constitution required as detailed above.

2. Charge Two

While Local 726 principal officer, you brought reproach upon the IBT and violated your fiduciary duties in violation of Article XIX, Section 7(b)(1) of the IBT

Constitution and Section 14(A)(3) of the Local's Bylaws, to wit:

As detailed above, on March 21 and 27, 2008, without the required Executive Board approval, you irrevocably pledged the Local's assets to secure loans you and two other Local officers made to the Local to enable the Local to repay the amount of the two prohibited transactions to the Pension Fund. You also violated the Local's Bylaws in causing the Local to borrow money from yourself and the others without required Executive Board approval.

3. Charge Three

While Local 726 principal officer, you brought reproach upon the IBT by misleading the IBT General Secretary-Treasurer in the performance of his duties in violation of Article XIX, Section 7(b)(1) and (2) of the IBT Constitution, to wit:

As described above, by letter dated March 24, 2005, you misrepresented to IBT General Secretary-Treasurer C. Thomas Keegel that the Local was reporting on the Local's Statements of Assets and Liabilities the liability under the Local's Severance Plan as the IBT had instructed you to do on at least three occasions. In addition, although you received a copy of Joint Council President John Coli's May 14, 2008 letter to General Secretary-Treasurer Keegel which inaccurately stated that the Local 726 officers had taken salary reductions effective April 1, 2008, you did not correct the misstatement in the letter.

B. John Falzone

While a Local 726 officer and Trustee of the Local 726 Employee Pension Fund, you brought reproach upon the IBT and violated your fiduciary duties in violation of Article XIX, Section 7(b)(1) and (2) and Article II, Section 2(b)(1), (2), and (6) of the IBT Constitution, to wit:

While an officer of Local 726 and a Trustee of the Local 726 Employee Pension Fund, in 2007 you caused the Pension Fund to enter into two ERISA prohibited transactions totaling $125,000.00. When you approved the loan from the Pension Fund as an Executive Board member, you violated your duties under ERISA by acting on behalf of an adverse party in a transaction involving the Pension Fund. You did not set any terms for the alleged loans the Pension Fund made to the Local including any repayment schedule and rate of interest. In addition, you made the loans without receiving any security for repayment or even a promissory note. In addition, you failed to hold documented meetings or maintain any records of Pension Fund activities. You failed to administer the plan in accordance with plan documents and for the benefit of the members as ERISA and the IBT Constitution required as detailed above.

C. Michael Marcatante

While a Local 726 officer and Trustee of the Local 726 Employee Pension Fund, you brought reproach upon the IBT and violated your fiduciary duties in violation of Article XIX, Section 7(b)(1) and (2) and Article II, Section 2(b)(1), (2), and (6) of the IBT Constitution, to wit:

While an officer of Local 726 and a Trustee of the Local 726 Employee Pension Fund, in 2007 you caused the Pension Fund to enter into two ERISA prohibited transactions totaling $125,000.00. When you approved the loan from the Pension Fund as an Executive Board member, you violated your duties under ERISA by acting on behalf of an adverse party in a transaction involving the Pension Fund. You did not set any terms for the alleged loans the Pension Fund made to the Local including any repayment schedule and rate of interest. In addition, you made the loans without receiving any security for repayment or even a promissory note. In addition, you failed to hold documented meetings or maintain any records of Pension Fund activities. You failed to administer the plan in accordance with plan documents and for the benefit of the members as ERISA and the IBT Constitution required as detailed above.

EXHIBITS TO THE CHARGE REPORT CONCERNING LOCAL 726

Ex.	1	Excerpts from IBT Constitution
Ex.	2	Letter dated March 24, 2005 from Thomas Clair to General Secretary-Treasurer C. Thomas Keegel
Ex.	3	Letter dated May 14, 2008 from John T. Coli to C. Thomas Keegel
Ex.	4	Sworn Examination of Thomas Clair dated June 17, 2009
Ex.	5	Subpoena Issued January 12, 2009 by United States District Court Judge Loretta Preska Re: Plan Document and Summary Plan Description
Ex.	6	Trustee Reports for Local 726 for January through April 2009
Ex.	7	Trustee Reports for Local 726 for 2008
Ex.	8	Trustee Reports for Local 726 for 2007
Ex.	9	Trustee Reports for Local 726 for 2006
Ex.	10	Trustee Reports for Local 726 for 2005
Ex.	11	Letter dated February 22, 2008 from Thomas Keegel to John Coli
Ex.	12	Excerpts from the Bank Statements of Local 726's Checking Account at LaSalle Bank for the months of January through April 2009
Ex	13	Membership Roster from Local 726 dated November 18, 2008 Listing the Number of Members in Local
Ex.	14	Sworn Examination of Linda Cruz dated June 16, 2009
Ex.	15	Sworn Examination of John Falzone dated June 16, 2009
Ex.	16	Sworn Examination of Kenneth Brantley dated June 16, 2009

Ex.	17	Sworn Examination of John Hurley dated June 17, 2009
Ex.	18	Sworn Examination of Michael Marcatante dated June 16, 2009
Ex.	19	Sworn Examination of Anthony Fiori dated June 16, 2009
Ex.	20	Employees Pension Plan of Local No. 726, I.B. of T. Trust Agreement
Ex.	21	Form 5500 for the Employees Pension Plan of Local Union No. 726, I.B. of T. for 2007
Ex.	22	Actuarial Valuation Report for 2007 for Local 726 Pension Fund
Ex.	23	Dues Record for Thomas Clair
Ex.	24	Form W-2's for Local 726 Officers for 2008
Ex.	25	Dues Record for John Falzone
Ex.	26	Certificate of Corporate Resolution for 2005
Ex.	27	Form 5500 for the Employees Pension Plan of Local Union No. 726, I.B. of T. for 2005
Ex.	28	Form 5500 for the Employees Pension Plan of Local Union No. 726, I.B. of T. for 2006
Ex.	29	Excerpts from ERISA
Ex.	30	Letter dated February 11, 2009 from Joel A. D'Alba, Esq. to IRB Re: No Trust Document Establishing the Pension Fund
Ex.	31	Subpoena Issued March 22, 2008 by United States District Court Judge Loretta Preska to Hartman & Associates
Ex.	32	Subpoena Issued March 22, 2008 by United States District Court Judge Loretta Preska to Howard Simon Associates

Ex. 33 Local 726 Pension Fund Trust Assets Report for 2006

Ex. 34 Letter dated February 13, 2009 From Thomas Hartman to Local 726 Pension Committee Re: Annual Actuarial Report for Local Union No. 726 I.B. of T. and Enclosures

Ex. 35 IRS Form 5330 for 2007

Ex. 36 Local 726 Check Register for October 2008

Ex. 37 Memorandum from Thomas K. Hartman to Thomas Clair and James Giemzik dated March 17, 2008

Ex. 38 Letter dated April 6, 2009 from Joel D'Alba Re: Loans of $125,000 from Pension Fund to Local 726

Ex. 39 Letter dated August 1, 2007 from Central States to Local 726 Re: Pension Fund Audit

Ex. 40 Audit Summary by Central States of Local 726 Pension Fund

Ex. 41 Letter dated May 9, 2007 from Central States to Local 726 Re: Adjusted Contributions of $158,345.30 for Health & Welfare Fund and $144,286.00 for Pension Fund for the Period from 2003 to 2006

Ex. 42 Letter dated August 8, 2007 from Central States to Local 726 Re: $216,597.09 Settlement

Ex. 43 Minutes of October 19, 2007 Special Emergency Executive Board Meeting

Ex. 44 Sworn Examination of James E. Giemzik dated December 11, 2008

Ex. 45 Letter dated March 19, 2008 from Thomas K. Hartman Re: Payment of $111,047.02 And Enclosures

Ex. 46 Local 726 Check dated October 31, 2007 to Local 726 Pension Fund for $17,000

Ex. 47 Letter dated March 25, 2009 from Howard Simon & Associates to IRB

Ex. 48 Excerpts from Local 726 Bylaws

Ex. 49 Executive Board Meeting Minutes for October 22, 2007

Ex. 50 Executive Board Meeting Minutes for 2008

Ex. 51 Severance Fund Plan for Local 726

Ex. 52 Calculation of Severance Pay for Officers and Business Agents for 2006, 2007 & 2008

Ex. 53 Dues Record for Kenneth Brantley

Ex. 54 Dues Record for John Hurley

Ex. 55 Dues Record for Michael Marcatante

Ex. 56 Dues Record for Business Agent Kevin Kaiser

Ex. 57 Dues Record for Business Agent Luther Woodruff

Ex. 58 Payroll Records for 2006

Ex. 59 Payroll Records for 2007

Ex. 60 Payroll Records for 2008

Ex. 61 Letter dated February 23, 2005 from C. Thomas Keegel to Local 726

Ex. 62 Letter dated March 9, 2005 from International Auditor Pratt to C. Thomas Keegel

Ex. 63 Excerpt from the IBT Audit of Local 726 in 2004

Ex. 64 Promissory Note and Irrevocable Pledge to Thomas Clair

Ex. 65 Promissory Note and Irrevocable Pledge to John Hurley

Ex. 66 Promissory Note and Irrevocable Pledge to Michael Marcatante

Ex. 67 Exhibits to IRB Sworn Examinations of Local 726 Officers taken June 16-17, 2009

Ex.	68	Letter dated May 26, 2009 from Joel A. D'Alba Esq. to IRB Re: Pension Fund Investments
Ex.	69	Check dated March 27, 2008 from Local 726 to the Local 726 Pension Fund, for $111,174.85
Ex.	70	Letter dated October 29, 2004 from C. Thomas Keegel to Local 726
Ex.	71	Schedule of Checks Issued to the LU 726 Pension Fund for 2004-2008
Ex.	72	Local 726 Pension Fund Bank Statements for 2004
Ex.	73	Local 726 Pension Fund Bank Statements for 2005
Ex.	74	Local 726 Pension Fund Bank Statements for 2006
Ex.	75	Local 726 Pension Fund Bank Statements for 2007
Ex.	76	Local 726 Pension Fund Bank Statements for 2008
Ex.	77	Dues Record for Jaclyn Clair
Ex.	78	Dues Record for Nancy Hordecki
Ex.	79	Payroll Records for Jaclyn Clair
Ex.	80	Payroll Records for Nancy Hordecki
Ex.	81	Minutes of July 21, 2008 Special Executive Board Meeting
Ex.	82	Plan Document for Local 726 I.B. of T. Pension Plan
Ex.	83	Letter from Joel A. D'Alba to the IRB dated February 23, 2009