



June 18, 2013

[REDACTED]

Dear [REDACTED]:

This Statement of Reasons is in response to the complaint that you filed with the U.S. Department of Labor on October 15, 2012, alleging that a violation of Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) occurred in connection with the election of officers of Laborers Local Union 78 held on June 9, 2012.

The Department conducted an investigation of your allegations. As a result of the investigation, the Department has concluded that, to the extent any violations of the LMRDA occurred during the conduct of the election, any such violation did not affect the outcome of the election, and thus the Department will not take action to set aside the election results.

You first alleged that members of the incumbent slate violated the LMRDA when they engaged in intimidation tactics. These alleged tactics included contacting construction site employers in an attempt to get insurgent candidates removed from their jobs, calling members and telling them they would not work again if they supported the insurgents, and [REDACTED] a Local 78 member who was a nominee for vice president.

The LMRDA and its interpreting regulations protect the right of union members to vote for or otherwise support the candidates of their choice without being subject to penalty, discipline, or improper interference or reprisal of any kind. 29 U.S.C. § 481(e); 29 CFR 452.82, 452.105.

However, the Department's investigation did not establish that a violation of these sections took place. First, the Department found no evidence during its investigation that the incumbent slate contacted construction site employers about insurgent candidates or contacted members and told them their jobs would be in jeopardy if they voted for members of the challenging slate. Nor did the investigation disclose that ballot secrecy was in any way compromised during or after the election process. Given that there was no issue as to the secrecy of ballots, there was no way for anyone to know how a member voted; thus, there is not an adequate basis for finding that

members of the incumbent slate retaliated against voters for voting for certain candidates.

With regard to your other allegations, the investigation found that [REDACTED] [REDACTED] from employment was unrelated to the election, and that the union properly disqualified him from candidacy. Specifically, the Department found that [REDACTED] was fired due to damage he caused during a remediation project in 2004 that resulted in his employer being sued. That lawsuit finally settled in 2012, and [REDACTED] was fired thereafter. [REDACTED] termination was not in reprisal for his support of certain candidates. With regard to the Local 78 disqualifying [REDACTED] from running for vice president, the union did so because, at the time of nominations, [REDACTED] was ineligible to run for office. He was working as an asbestos supervisor and was not a member within the bargaining unit covered by the collective bargaining agreement. Accordingly, there was no violation of the LMRDA as to this allegation.

You further alleged that incumbent candidates campaigned on union time when candidates made campaign calls from the union office to several members requesting support in the election. While you did not provide names of any of the members who received such phone calls, you did provide campaign-related text messages that, considering the time the messages were sent, were ostensibly sent during working hours. The LMRDA generally prohibits the use of union funds or resources for campaign purposes, including campaigning while on paid union time. 29 U.S.C. § 481(g); 29 CFR 452.73. However, campaigning that is merely incidental to regular union business is not a violation of the LMRDA. 29 CFR 452.76.

The investigation found conflicting evidence as to whether campaigning occurred on union time. However, any violation that may have occurred had no impact on the outcome of the election. First, the Department found that Business Agent [REDACTED] [REDACTED] used his union-issued cell phone to transmit at least three campaign-related text messages to approximately 125 supporters of the incumbent slate. The investigation revealed conflicting evidence as to whether [REDACTED] a union organizer, used a union phone to call 15 members in support of incumbent business manager [REDACTED] [REDACTED]. In any event, the number of individuals receiving the message, 140 (125 +15), was far less than the margin of victory in the most closely contested race (418 votes, by OLMS recount, for the position of business manager). Accordingly, to the extent a violation took place, it could not have affected the outcome of the election, and thus the election results will not be set aside on these grounds. *See* 29 U.S.C. § 482(c).

You further alleged that the ballot used for the election violated the LMRDA because: (a) the ballot design was confusing, (b) the use of red boxes on the ballot was prejudicial because the incumbent slate identified itself with the color red, and (c) the ballot deviated from the past practice of listing each slate in a column.

The form of the ballot is not prescribed by the LMRDA. 29 CFR 452.112. The position and order of candidates' names on the ballot may be done in any reasonable manner permitted by the union's constitution and bylaws, so long as members are able to vote

for the candidates of their choice. The investigation disclosed that the election officials did not receive any complaints from voters expressing any such confusion. As for the color of the fill-in boxes on the ballot, the company contracted by the union to print the ballots, ElectionsUSA, used the red color because it aids the scanners in tabulating the votes correctly. There is no evidence that members voted for the incumbent slate merely because the fill-in boxes were printed in the color red. Further, the investigation did not find that the ballot design was contrary to Local 78's bylaws - the local's governing documents are silent regarding the ballot design - or that the design of the ballot otherwise prevented members from voting for the candidates of their choice. Accordingly, there was no violation of the LMRDA as to this allegation.

You further alleged that at the New Jersey polling site, observers for the incumbents and representatives of ElectionsUSA instructed voters to vote for incumbents. You base this allegation on reports from [REDACTED]. Similarly, it was alleged that an election committee member named [REDACTED] (last name unknown) at the Queens, New York, polling site instructed about 100 members, in Polish and English, to vote for incumbent business manager candidate [REDACTED].

The Department's investigative findings did not substantiate these allegations. In interviews, [REDACTED] and [REDACTED] denied that they heard any person at the New Jersey polling site instruct members to vote for the incumbents. The third witness, [REDACTED], stated that he heard office secretaries tell the voters in line to "vote for red," which was the color associated with the incumbent slate. However, the Department interviewed several witnesses who were inside the New Jersey and Queens, New York, polling sites on the day of the election, and none saw or heard any improper campaigning or instructions to voters inside the polling sites. Further, nobody raised issues of improper campaigning to the election committee chairs present at the Queens, New York, and the New Jersey polling sites on the day of the election.

The Department determined that the [REDACTED] in question was election committee member [REDACTED], who was present at the Queens polling site. [REDACTED] reported that: (a) he did not instruct members how to vote, and (b) he doesn't speak Polish, thereby refuting that element of the allegation. In sum, there was no evidence corroborating the allegation of improper campaigning inside the polling site, and thus no evidence of a violation of the LMRDA.

You further alleged that electrical outages caused power to be shut down at both polling sites on the day of the election, and that these outages may have affected the outcome of the election, although you admitted you had no direct knowledge of the issue.

The investigation found that the union had wireless internet connections at both polling sites in order to check voter eligibility on the ElectionsUSA site. This internet connection was briefly lost at the Queens, New York polling site, but nobody in line to vote at that polling site left the line while the problem was being resolved. Further,

OLMS recounted the ballots to ensure that the loss of connection did not affect the count, and while there were minor discrepancies, there were none that affected the outcome of any of the races. Accordingly, there was no violation of the LMRDA as to this allegation.

You alleged that Local 78 violated the LMRDA when it allowed members in arrears on dues payments and members without identification to vote in the election. In support of this allegation, you provided the name of one individual, [REDACTED] whom you allege voted in the election despite the fact that she was a member of Local 12A, not Local 78.

Article IV, Section 6(d) of the LIUNA Uniform Local Union Constitution states that the secretary-treasurer and an election committee member will determine a voter's eligibility after the member presents identification. The Election Day Rules and Procedures dated June 1, 2012, state that a member must present both a valid photograph ID and a membership card, and that these documents will be inspected by the judges and may also be requested by the observers. An election judge and an individual from Unisyn, a company sub-contracted by ElectionsUSA to help conduct the election, both stated that proper identification was checked prior to allowing anyone to vote.

The Department's records review included a review of the eligible voter rolls, a review of the members who did not vote, an examination of the members' dues payment records, and the voter sign-in books for the Queens, New York, and New Jersey polling sites. This records review confirmed that nobody named [REDACTED] (or [REDACTED], or [REDACTED]) voted in the Local 78 election. The investigation further found that 19 ballots were set aside as "challenged" because those members had been suspended for delinquency in dues payments, and that those votes were not counted. Accordingly, there is no evidence to support your allegation that a violation of the LMRDA occurred.

Finally, you alleged that Local 78 violated the LMRDA when the incumbent business manager candidate [REDACTED] "screamed" and gave instructions to the judges of elections.

The investigation did not confirm that this incident occurred. The investigation revealed that [REDACTED] engaged in an argument with an observer, but the observer stated that [REDACTED] did not scream and that he did not otherwise notice [REDACTED] intimidating anyone at the polling site. Under the LMRDA members have the right to exercise the rights granted by the LMRDA without fear, intimidation or reprisal. It was not alleged, and it was not disclosed, that anyone failed to exercise rights granted by the LMRDA because of intimidation.

For the reasons set forth above, it is concluded that the violation of the LMRDA in this election did not affect the outcome of the election, and I have closed the file in this matter.

Sincerely,

Patricia Fox
Chief, Division of Enforcement

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