

JUN 16 2010

OLMS Director Decision No. 2010 - 1

[REDACTED]

Dear [REDACTED]:

This is in response to your letter of July 29, 2009, requesting a review of the dismissal of your complaint concerning the election of the officers of Local 2142 of the American Federation of Government Employees (AFGE). Your complaint was dismissed by letter dated July 9, 2009, from the Chief of the Division of Enforcement (DOE Chief) of the Office of Labor-Management Standards (OLMS) transmitting a Statement of Reasons for the dismissal.

The election of officers of federal sector unions is governed by the standards of conduct provisions of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 7120(c), et seq. The statute requires that the regulations implementing the standards of conduct conform to the principles applicable to private sector labor organizations. 5 U.S.C. § 7120(d). Accordingly, the regulations at 29 CFR § 458.29 adopt the officer election provisions of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), §§ 401(a)-(g), and the Department's interpretative bulletin on union officer elections under the LMRDA at 29 CFR Part 452 also apply to officer elections under the CSRA standards of conduct regulations. Further, court decisions under the LMRDA are followed in applying the standards of conduct. See 29 CFR § 458.1.

The regulations provide for review of the dismissal of your complaint but only on the basis of deciding whether the decision by the DOE Chief to dismiss the complaint "was arbitrary and capricious." 29 CFR § 458.64(c). This review standard follows the decision of the Supreme Court in *Dunlop v. Bachowski*, 421 U.S. 560 (1975). In *Bachowski*, the Court recognized "the special knowledge and discretion of the Secretary for the determination of both the probable violation and the probable effect" holding that the reviewing court may not substitute its judgment for the Secretary's. *Id.* at 571-72. The Court also stated that the review of a decision to dismiss an officer election complaint is limited to consideration only of the Statement of

Reasons, "[e]xcept in what must be the rare case," in order to determine whether there was a rational and defensible basis for the dismissal. *Id.* at 572-73. A review of the Secretary's decision "may not extend to cognizance or trial of the complaining member's challenges to the factual bases of the Secretary's conclusions either that no violations occurred or that they did not affect the outcome of the election." *Id.* at 573.

Thus, in accordance with the principles in *Bachowski*, the OLMS Director's¹ review must be limited to an examination of the Statement of Reasons to determine whether the dismissal is "so irrational as to constitute the decision arbitrary and capricious."² *Id.* at 572-73. Therefore, the scope of my review encompasses only the DOE Chief's July 9, 2009 letter and the information you provided in your July 29, 2009 letter. While the standard for review of the dismissal precludes a de novo review of the investigative file, in order to carefully review and understand your allegations I consulted the AFGE National Constitution and the AFGE Election Manual, both of which were referenced in your request to review dismissal and in the Statement of Reasons, as well as the original complaint.

You have asserted throughout your request for review that AFGE Local 2142 was "arbitrary and capricious," with respect to your allegations regarding ballot design, denial of observers' protests, and improper invalidation of ballots. However, in keeping with the standard set forth in *Bachowski*, the purpose of this review is to determine whether the reasons for dismissal of your complaint given by the DOE Chief, in the Statement of Reasons, were arbitrary and capricious – not whether AFGE Local 2142 was arbitrary and capricious in administering the election.

Further, you raised a concern about the amount of time it took the DOE Chief to issue a Statement of Reasons, and charged that the DOL "intentionally, capriciously and arbitrarily delayed" issuing it. Under the *Bachowski* standard, the review of dismissal extends to the determination of whether the reasons provided for dismissing your complaint were arbitrary and capricious and does not extend to a review of the length of time taken to issue the statement of reasons. Further, there is no timeframe established in the case law or regulations for issuance of the statement of reasons.

For the reasons set forth below, I find that the DOE Chief's reasons for the dismissal of your complaint are not arbitrary and capricious, and therefore I affirm the dismissal.

ALLEGATIONS ADDRESSED IN STATEMENT OF REASONS – RAISED IN INTERNAL UNION PROTEST

Allegation Regarding "Invalidated" and "Altered" Ballots

In your request for review you alleged that a chairperson of the election committee "invalidated" 85 votes and "altered" approximately 75 additional ballots, and you alleged that these actions affected the outcome of the election.

¹ As of November 8, 2009, the Department of Labor's Employment Standards Administration (ESA) was dissolved into its four constituent components and consequently the position of Assistant Secretary no longer exists. The Secretary of Labor ordered the delegation of Section 701 of the Civil Service Reform Act, specifically including 5 U.S.C. 7120, to the authority of the Director of the Office of Labor Management Standards. The delegation also includes ESA responsibilities as applied to the LMRDA, 29 U.S.C. 401, et. seq. Updated changes to the regulations will be forthcoming.

² In your request to review dismissal, you expressed dissatisfaction with the investigation of your election complaint, with the investigator assigned to the case, with the DOE Chief, and with the U.S. Department of Labor (DOL) in general. Note that these issues are beyond the scope of my review as explained above, and accordingly will not be addressed.

The Statement of Reasons addressed this allegation. The Statement of Reasons explained that investigation of this allegation revealed that Local 2142 violated the LMRDA by improperly invalidating a total of 43 ballots. The local had invalidated these 43 ballots in their entirety when the vote for only one position was unclear. As set forth in the Statement of Reasons, pursuant to Department of Labor regulations at 29 CFR § 452.116, an entire ballot may not be voided because of a mistake made in voting for one of the offices on the ballot, and the local by voiding these ballots in their entirety violated section 401(e) of the LMRDA which provides that each member in good standing shall be entitled to vote in a union election. 29 U.S.C. § 481(e). The Statement of Reasons also detailed that investigation of this allegation revealed that the union properly voided a total of 10 ballots because they contained identifying information. See 29 C.F.R. §452.97 (the ballot must not contain any markings which upon examination would enable one to identify it with the voter.)

The Department's investigative findings did support your allegation with respect to the local's improper invalidation of ballots. However, the investigation did not support the number of ballots you alleged to have been invalidated. As detailed in the Statement of Reasons, the Department conducted a proper recount of the ballots and included in that recount the 43 ballots that had been improperly invalidated. See *SOR*, p.2. The Department's recount revealed that none of the outcomes of the races in the election changed as a result of the recount. The DOE Chief specifically detailed that, while Local 2142 violated section 401(e) of the LMRDA by improperly voiding ballots, the violation did not affect the outcome of the election. For reference, 29 CFR § 452.136(b) states: "Violations of the election provisions of the Act which occurred in the conduct of elections held within the prescribed time are not grounds for setting aside an election unless they 'may have affected the outcome.'" You did not provide any additional information or analysis in your request for review as to why this conclusion was arbitrary and capricious. Under the standard of review established in *Bachowski* discussed above, I find that the conclusion of the DOE Chief was not arbitrary or capricious.

Allegation Regarding Ballots Cast by Retired Members

In your request for review, you disagreed with the DOE Chief's determination that Local 2142 did not violate section 401(e) of the LMRDA when it counted ballots cast by retirees. The Statement of Reasons addressed this allegation and explained that retired members are eligible to vote pursuant to Article III, Section 1(c), of the AFGE National Constitution. That section states, "Any person who at the time of being separated without prejudice from employment covered by subsection (b) was a member in good standing of any local is eligible to continue membership in this Federation." Accordingly, retirees who were members in good standing at the time of separation are eligible to vote along with any other members in good standing.

In your request for review, you reference the participation of individuals in the "Special Retiree Affiliation" category that is defined in Article III, Section 1(e) of the AFGE National Constitution. "Special Retiree Affiliation" is a retiree category that differs from those individuals, including retirees, who have membership under Section 1(c) of the AFGE National Constitution. Article III, Section 1(e) defines an individual in the "Special Retiree Affiliation" category as "(a)ny retired person who either: (1) At the time of being retired from governmental employment covered by subsection (b) was *not a member of good standing* of any local, or (2)

Has dropped membership in the Federation subsequent to retirement from employment covered by subsection (b)." (Emphasis added.) Persons in the category of "Special Retiree Affiliation," unlike retirees with membership under section 1(c), do not have voting rights, according to Article III, Section 1(e) of the AFGE National Constitution. You appear to equate an allegation of participation of retirees with membership pursuant to section 1(c) with an allegation of participation by individuals in the "Special Retiree Affiliation" category of section 1(e) although these are two distinct categories with distinct rights under the constitution.

The DOE Chief found that the retirees who voted in the election were members in good standing and were thus eligible to vote.

The scope of the review of dismissal is limited to a consideration of reasons given for dismissing a complaint to determine whether the dismissal was rational and defensible. Under the standard of review established in *Bachowski* discussed above, I find that the DOE Chief adequately assessed the facts forming the basis for the conclusion that counting eligible retiree members' ballots does not constitute a violation of LMRDA Section 401(e), and that the DOE Chief's conclusion was not arbitrary and capricious.

Allegation Regarding Membership List

In your request for review, you alleged that you were denied a complete copy of the membership list. Further, you stated that, on the day of the election, a retiree membership list was delivered to the other slate, while your slate's request to receive the list was denied.

The Statement of Reasons (SOR) clearly addresses your allegation and details the factual basis for the DOE Chief's decision that no violation occurred. The DOE Chief states:

The Department's investigation revealed that you did receive a copy of the membership mailing list, which included all working and retired members. Further, you stated that you chose not to send out a campaign mailing due to the cost involved with the mailing. In fact, the Department found that no candidate made a campaign mailing. Accordingly, there is no violation of the LMRDA.

See SOR, p. 2. You did not provide any additional information or analysis in your request for review as to why this conclusion was arbitrary and capricious. I find that the DOE Chief's conclusion was not arbitrary and capricious.

ALLEGATIONS NOT ADDRESSED IN STATEMENT OF REASONS – NOT RAISED IN INTERNAL UNION PROTEST

The above allegations were the only allegations properly protested to the Department of Labor. The Statement of Reasons acknowledges that you raised multiple additional allegations in your protest to the Department of Labor that were not raised in your internal union protest. In your request to review the dismissal of your complaint, you referenced the DOE Chief's statement that you raised multiple allegations that were not raised in your internal union protest and alleged

that there was improper intervention in the election process which you believe resulted in a denial of your internal protest procedures. You alleged that the National Vice President (10th District) advised the election chairperson to invalidate all protests. You also indicated that you believe the outcome of the election was affected as a result. You do not state that there was improper intervention in the exhaustion protest process such that you were prevented from including these allegations in your protests to the union. Nor do you allege that these allegations were in fact protested internally to the union and denied. Protests denied in the internal protest procedure are legitimate subjects of protest to the Department of Labor.

The Statement of Reasons explains that allegations not raised in your internal union protests are not properly before the Department. See 29 C.F.R. § 452.135 (the union member must have exhausted internal union remedies available under the union constitution and bylaws before filing a complaint with the Department of Labor). Additionally, under section 458.64(a) of the regulations, no investigation shall be conducted if it is determined after preliminary inquiry that the complaint is deficient for any of several enumerated reasons including failure to exhaust remedies available under the constitution and bylaws of the labor organization and any parent body. Your allegations concerning the following issues included in your request for review were not properly exhausted within the union: (1) duplicate voting by slate; (2) improper ballot design; (3) denial of observers' protests; (4) failure to win by a majority of votes; and (5) denial of internal protest procedures. As these allegations were not properly raised in your internal protest, they were properly not within the scope of the investigation. Consequently, the DOE Chief was not arbitrary or capricious in not addressing these allegations in the Statement of Reasons. Under the standard of review established in *Bachowski*, as discussed above, I find that the conclusion of the DOE Chief that these allegations were not properly before the Department for investigation was not arbitrary and capricious.

In your request to review the dismissal of your complaint (third and fourth paragraphs of item 7, and last two paragraph of the letter), you made allegations about a possible misuse of union funds. This matter is not covered by or subject to review under the election provisions of the standards of conduct. Should you have concerns about possible misappropriation of union funds, you may contact the OLMS New Orleans District Office.

For the reasons discussed above, I find that there was a reasoned basis for the dismissal of your complaint, and that the dismissal of your complaint was not arbitrary and capricious. Therefore, I affirm the DOE Chief's decision to dismiss your complaint.

Sincerely,

John Lund, Ph.D.
Director

cc: President, AFGE Local 2142
Chief, OLMS Division of Enforcement
OLMS New Orleans District Office