



August 15, 2012



Dear [REDACTED]

This Statement of Reasons is in response to your complaint filed April 23, 2012 with the U.S. Department of Labor alleging that violations of section 701 of the Civil Service Reform Act of 1978 (CSRA) occurred in connection with the January, 12, 2012 mail ballot election of officers conducted by the National Association of Government Employees (NAGE), Local R-12-228. The Department applies section 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 481, to all union elections subject to the CSRA. 29 C.F.R § 458.29.¹

The Department conducted an investigation of your allegations. As a result of the investigation, the Department has concluded that there were no violations of the LMRDA which may have affected the outcome of the election.

First, you alleged that incumbent President and candidate Sharon Schubert sent a campaign email using her government email account and computer to Local members. Section 401(g) of the LMRDA prohibits the use of employer or union funds to promote the candidacy of an officer. The investigation revealed that on December 14, 2011, Shubert sent an email to members using her government email account and computer. This email announced that, "In an effort to better serve the needs of our employees (working evenings and 'off tours') the Union has extended its office hours." You alleged that this constituted unlawful campaigning using employer funds.

In considering whether an employer funded communication constitutes promotion of a candidate in violation of section 401(g), the Department evaluates the timing, tone, and content of the particular communication. *Chao v. North Jersey Area Local Postal Workers*

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¹ All references in this Statement of Reasons will be to the LMRDA and its sections. In each instance, however, the reference should be understood as "the Act [or section of the Act] insofar as made applicable to elections of federal-sector unions by 29 C.F.R. § 458.29."

Union, 211 F.Supp.2d 543, 551 (D.N.J. 2002) (quoting *Donovan v. Metro. Dist. Council of Carpenters*, 797 F.2d 140, 145 (3d Cir. 1986)).

The investigation revealed that this email was sent out on the same day that ballots were mailed. However, the Department found that the tone of the email was neutral; that is, Shubert does not disparage or promote any candidate in this email. Further, the content of the email was informational. There was no reference to the election or to any candidate in the election. In total, these factors weigh against a finding that Shubert's email was unlawful campaigning. This was an instructional email, informing member of the union's new hours of operation. Consequently, there was no violation.

Second, you alleged that Schubert's possession of a list of union members constituted disparate treatment among candidates, in violation of section 401(c) of the LMRDA. Section 401(c) prohibits unions from discriminating in favor of or against any candidate with respect to the use of membership lists. Specifically, you claimed that, as incumbent local president, Schubert had an unfair advantage because she had access to membership lists that you could not access. However, union officers regularly acquire lists of union members, addresses, worksites and emails through the course of their official capacity as officers. An officer's possession of a membership list is not a violation of the LMRDA. It is only a violation if the officer uses the list to promote his or her candidacy, and does not provide equal access to all other candidates. The investigation found that Schubert did not use any union membership list, acquired through her official union capacity, to campaign. Accordingly, there was no violation.

Third, you alleged that not all members in good standing were able to vote due to inaccuracies of the union's membership list. Section 401(e) of the LMRDA requires that every member in good standing shall have the right to vote in the union's election. You stated that while inspecting the Local's membership list, you and [REDACTED] candidate for Executive Vice President, noticed several inaccuracies on the list. Further, you noted that initially you did not receive your ballot because the Local had an incorrect zip code. Based on these observations, you questioned the accuracy of the membership list.

The Department investigated how the Local created its list of eligible voting members and whether the Local's actions effectuated the right to vote of all members in good standing. Election Officer [REDACTED] created the list by first using a list of members' names and addresses provided by Schubert, which was last updated on November 1, 2011. Bentley then cross-referenced Schubert's list with a dues check-off list that she obtained from the NAGE National Office to create a master membership list. After nominations were closed, [REDACTED] added new members who had submitted 1187 Forms before the November 29 cut-off date to vote to the master list. [REDACTED] also

sent emails to all members' work email addresses, requesting that members confirm that the union had correct mailing addresses on file. In her email, [REDACTED] also advised members to contact her if they had not received a ballot by December 21, 2011.

After you and [REDACTED] told [REDACTED] about inaccuracies in the membership list, [REDACTED] consulted with the NAGE National Office's Finance Department and made corrections to the membership list. This revised membership list was then used to mail the notice of election and ballot to all members. There were 117 ballot packages mailed, with 15 being returned as undeliverable, including your own. [REDACTED] contacted thirteen of those whose ballots were returned as undeliverable to ask for an updated address. Only one member provided a corrected address. The other two members not contacted, including you, requested a duplicate ballot. The Department has determined that the Local's method of updating and verifying its list of members was reasonable. The Department has also concluded that the Local reasonably mitigated any inaccuracies by trying to contact the intended recipients of the returned undeliverable ballots and by having a duplicate ballot request procedure. Additionally, the Department found that while seven ineligible members were sent ballots, none of these members voted in the election. Therefore, there was no violation which may have affected the outcome of the election.

The Department notes that the membership list provided to all candidates for inspection did not include member addresses as required by section 401(c) of the LMRDA. If the Local had provided all the candidates with the names and addresses of the members, inaccurate addresses could have been corrected. Nevertheless, the Department has concluded that the Local made appropriate efforts to update and verify its membership list and also contacted members whose ballots were returned as undeliverable so that replacement ballot could be sent. Accordingly, there was no violation which may have affected the outcome of the election.

Fourth, in a related allegation, you alleged that you were not provided an opportunity to inspect the final, corrected member eligibility list. Section 401(c) of the LMRDA provides the right for every candidate to inspect the union's member list once within 30 days before an election. The Local's election rules effectuated this right by stipulating that any candidate could view the final membership list between 8:00am and 5:00pm on December 12 and 13, 2011. There was no limitation on the number of times a candidate could view the list on those dates. The investigation revealed that the union permitted you to inspect the membership list 30 days prior to the election, as required by section 401(c). Having found inaccuracies in the list on December 12, as discussed above, you could have asked to see a corrected list, but you did not. Accordingly, the Local satisfied the requirements of section 401(c).

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Fifth, you alleged that you were not allowed to observe the ballot preparation, mailing, or pick-up from the post office. Section 401(c) of the LMRDA gives a candidate the

right to have an observer at the polls and at the counting of the ballots. The Department has interpreted this provision to include the right to observe the mail ballot election process, including ballot preparation, mailing, and ballot pick-up. *See* 29 C.F.R. § 452.107(c). The investigation found that you emailed ██████ requesting information about the Local's election rule for permitting observers to be present at the ballot pick-up and tally. You specifically were concerned about observers being present when the ballots were to be picked up from a post office box. ██████ responded that there would be no post office pick-up because the return ballots were mailed to the NAGE Western Regional Office (NAGE Office), rather than a post office box. ██████ further stated that candidates were permitted to observe the ballot tally. You made no further inquiries about the role of observers and you were present as your own observer when the ballots were later opened.

Even though the ballots were sent directly to the NAGE Office, observers you were entitled to be present everyday when ballots were received. However, the Department has found no probable cause establishing that this violation may have affected the outcome of the election. 29 C.F.R. § 458.65(a). The Department found no evidence of ballot fraud or tampering. The Department's review of the election records found that 46 of 110 eligible members returned ballots. The Department examined each ballot return envelope and did not see any signs of ballot tampering. Furthermore, the Department interviewed the Western Regional Coordinator who worked in the NAGE Office at the time ballots were being returned. The Coordinator recalled seeing significantly less than 100 ballots arrive at the NAGE Office. She estimated that she saw approximately 40 ballots returned to the NAGE Office, which is supported by the 46 returned ballots found in the election records. One of these ballots was correctly voided for containing identifying information. Accordingly, the Department has concluded that there is no probable cause to believe that the violation of section 401(c) may have affected the outcome of the election.

Finally, you alleged that the Local's use of the NAGE Office, rather than a post office box, compromised voter secrecy because ██████ and the Coordinator could identify who was voting in the election from the ballot envelope's return address. Section 401(b) of the LMRDA requires that local unions elect their officers by secret ballot. The LMRDA, however, does not require that a union use a post office box during secret ballot elections. While ██████ and the Coordinator may have been able to identify who had voted from the ballot envelope's return address, the identity of a voter is not the kind of secrecy which section 401(b) was meant to protect. Section 401(b) protects how a member has voted, not whether they have voted. *See* 29 C.F.R. § 452.97. Therefore, there was no violation of section 401(b) of the LMRDA.

For the reasons set forth above, the Department has concluded that there was no violation of the LMRDA that may have affected the outcome of the election. Accordingly, the Department has closed the file on this matter.

Sincerely,

Patricia Fox
Chief, Division of Enforcement

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