U.S. Department of Labor

Office of Labor-Management Standards
Washington, DC 20210
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July 12, 2016

[redacted]

Dear [redacted]:

This is in response to your December 21, 2015 letter requesting a review of the determination dismissing your complaint concerning the election of union officers conducted by the American Foreign Service Association (AFSA) on June 4, 2015. You were informed that your complaint was dismissed by Acting Chief of the Division of Enforcement (DOE) Stephen Willertz, of the Office of Labor-Management Standards (OLMS), in letter dated September 1, 2015. A subsequent Statement of Reasons letter, explaining the reasons for the dismissal of your complaint and informing you of your right to request review of the determination, was sent by DOE Chief Sharon Hanley on December 10, 2015. For the reasons that follow, I affirm the determination dismissing your complaint.

The election of officers of labor organizations in the foreign service is governed by the standards of conduct provisions of the Foreign Service Act of 1980 (FSA), 22 U.S.C. § 4117, *et seq*. The statute requires that the regulations implementing the standards of conduct conform to the principles applicable to private sector labor organizations. 22 U.S.C. § 4117(d). Accordingly, the regulations at 29 C.F.R. § 458.29 adopt the officer election provisions of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), 29 U.S.C. §§ 401(a)-(g). The Department's interpretative bulletin on union officer elections under the LMRDA at 29 C.F.R. Part 452 also applies to officer elections under the FSA standards of conduct provisions. Further, court decisions under the LMRDA are followed in applying the standards of conduct. See 29 C.F.R. § 458.1.

The regulations provide for review of the determination dismissing your complaint but only on the basis of deciding whether the decision by the Chief of the OLMS Division of Enforcement (DOE) to dismiss the complaint "was arbitrary and capricious." 29 C.F.R. § 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. I have carefully reviewed your request for review, its appendices, your July 7, 2015 email correspondence and attachments, the Statement of Reasons, and your original complaint. For the reasons identified below, I have determined that DOE Chief Hanley was not arbitrary and capricious when she dismissed your complaint.

In your appeal, you argued that DOE Chief Hanley's decision that Barbara Stephenson, president of the AFSA, was eligible to run for president under section 1017(e)(1)(A) (ii) of the FSA was arbitrary and capricious because: (1) the decision erred in its interpretation of the definition of "management official" in section 1002(12) of the FSA; (2) the decision was inconsistent with section 1017(e) of the FSA which prohibits management officials from participating in the management of labor organizations; and (3) the Department exceeded its authority in determining that Ms. Stephenson was not a management official under section 1002(12). These arguments are addressed below; your first and second arguments are discussed together under the first heading.

1. The definition of "management official" as used in section 1017(e) of the FSA

In your complaint to the Secretary, you alleged that Ms. Stephenson was ineligible to run for president of AFSA because she was serving as the Dean of the Leadership and Management School (LMS) at the Foreign Service Institute, which you contended was a "management official" under section 1017(e)(1)(A)(ii) of the FSA because she was "involved in the training of management officials responsible for labor relations overseas" and she "participat[ed] in the execution of a settlement agreement to an unfair labor practice charge filed by the union." Accordingly, you asserted that she was subject to the two-year bar from participating in the management of a labor organization as provided in that section. You acknowledge that this allegation was addressed in the Statement of Reasons, but argue the Statement of Reasons failed to address a second part of your complaint, namely that as a "designated management official" she was prohibited from being involved as a candidate for president under section 1017(e)(1)(A)(i). Because this allegation was not raised before, it is untimely. Nonetheless, it is also addressed below.

Section 1017(e)(1)(A) prohibits individuals from participating in the management of a labor organization if such individual is a "management official" (sub-subsection (1)(A)(i)) or if such "individual … has served as a management official … during the preceding two years" (sub-subsection (1)(A)(ii)):

> **(e) Participation in labor organizations restricted**
>
> **(1)** Notwithstanding any other provision of this subchapter--
>
> (A) participation in the management of a labor organization for purposes of collective bargaining or acting as a representative of a labor organization for such purposes is prohibited under this subchapter--

> **(i)** on the part of any management official or confidential employee;
> **(ii)** on the part of any individual who has served as a management official or confidential employee during the preceding two years; or
>
> …
>
> **(2)** For the purposes of paragraph (1)(A)(ii) …, the term "management official" does not include--
> (A) any chief of mission;
> (B) any principal officer or deputy principal officer;
> (C) any administrative or personnel officer abroad; or (D) any individual described in section 4102(12) (B), (C), or (D) who is not involved in the administration of this subchapter or in the formulation of the personnel policies and programs of the Department.

22 U.S.C. § 4117(e). Significantly, with respect to an "individual who has served as a management official … during the preceding two years," section 1017(e)(2)(D) excludes several categories of management official from the two-year cooling off period unless such individual is "involved in the administration of this subchapter or in the formulation of the personnel policies and programs of the Department." 22 U.S.C. § 4117(e)(2)(D). "This subchapter" refers to subchapter 10 on Labor-Management Relations.

Under section 1002(12) of the FSA, 22 U.S.C. § 4102(12), a "management official" is an individual who:

> **(A)** is a chief of mission or principal officer;
> **(B)** is serving in a position to which appointed by the President, by and with the advice and consent of the Senate, or by the President alone;
> **(C)** occupies a position which in the sole judgment of the Secretary is of comparable importance to the offices mentioned in subparagraph (A) or (B);
> **(D)** is serving as a deputy to any individual described by subparagraph (A), (B), or (C);
> **(E)** is assigned to carry out functions of the Inspector General of the Department of State and the Foreign Service under section 3929 of this title; or
> **(F)** is engaged in the administration of this subchapter or in the formulation of the personnel policies and programs of the Department[.]

22 U.S.C. § 4102(12). You have asserted that Ms. Stephenson was a management official by virtue of both section 1002(12)(C) and (F).

In her Statement of Reasons, DOE Chief Hanley addressed your allegation that Ms. Stephenson was a member of management by explaining that under section 1017(e)(2), which applies to the two-year cooling off period, Ms. Stephenson would not be considered a management official. While you alleged extensive facts in order to prove that Ms. Stephenson was a "management official" under category (C), Section 1017(e)(2) excludes from its definition of "management

official" category (C) of section 1002(12) unless such person is involved in the administration of this subchapter or in the formulation of the personnel policies and programs of the Department, repeating the language of section 1002(12)(F).[1] Thus, if Ms. Stephenson was not involved in the administration of this subchapter or in the formulation of the personnel policies and programs of the Department, it is unnecessary to decide whether Ms. Stephenson was a "management official" under category (C).

The Statement of Reasons reported that the Department's investigation found that Ms. Stephenson never participated in the grievance process, engaged in collective bargaining, discussed matters with employees or management regarding subjects of bargaining, or interacted with AFSA officials. The investigation further revealed that, while a training course that she administered derived from a settlement agreement negotiated with the union, Ms. Stephenson had no role in such negotiations. The investigation even revealed that she did not assume her position as Dean until after the parties entered into the settlement. Accordingly, the Statement of Reasons concluded that Ms. Stephenson's position as Dean did not involve administration of any policies or requirements governing labor management relations under subchapter 10. It further concluded that, under Section 1002(12)(F), Ms. Stephenson could not be considered a management official or a management official subject to the cooling off period of section 1017(e)(1)(ii) and was thus eligible to run for president. Therefore, I do not find that DOE Chief Hanley's conclusion that there was no violation that affected the outcome of the election was arbitrary or capricious.

However, you state in your appeal that the Statement of Reasons failed to address one part of your complaint, whether Ms. Stephenson's "then position as Dean of the [LMS] at the Foreign Service Institute, a position which [you] alleged was a designated management official, prohibited her from involvement in union affairs as a candidate for President." As noted above, this remaining allegation appears to be a new argument that the "then" Dean of the LMS was prohibited from participating in the union under section 1017(e)(1)(a), in which the term "management official" is defined to include all of the provisions of 1002(12). Notwithstanding your failure to raise this argument in a timely manner, I do not find any merit in this additional allegation.

Under this broader definition, you claim that Stephenson was a management official under section 1002(12)(C), which states that an individual is a management official if he or she "occupies a position which in the sole judgment of the Secretary is of comparable importance to the offices mentioned in subparagraph (A) or (B)." You claim that the Dean of the LMS is such a position based on the Department of State's 1981 letter to AFSA, which listed Coordinator of the Senior Seminar as a management position. However, I do not find, as arbitrary and capricious, DOE Chief Hanley's decision to not consider this to be an adequate basis on which to determine that Ms. Stephenson's position, as Dean of the LMS, fell within category (C). As DOE Chief Hanley wrote in her letter, the 1981 list was a "proposed" list of management officials. Further, the position of "Coordinator, Senior Seminar," has been abolished, as has the Senior Seminar itself.

[1] These provisions only differ in that section 1017(e)(2)(D) uses the term "involved with" while section 1002(12)(F) uses the terms "engaged with." With respect to the Statement of Reasons' analysis, this wording difference is not significant.

Nonetheless, even if the facts that you have alleged were adequate to establish that the position in which Ms. Stephenson was serving fell under category (C) of the definition of "management official," your argument would still fail. As you acknowledge, Ms. Stephenson is no longer serving in this position and was no longer serving in this position once she became President. In your appeal, you argue for the first time that "currently-serving management officials ... cannot be nominees for office." Section 1017(e)(1)(A)(i) bars currently-serving management officials from "participation in the management of a labor organization for purposes of collective bargaining or acting as a representative of a labor organization for such purposes." 22 U.S.C. § 4117(e)(1)(A)(i). There is no bar to merely running for office while serving as a management official because a nominee or candidate for union office neither participates in the management of a labor organization nor acts as a representative of such an organization. Accordingly, even if Ms. Stephenson had been a category (C) official, her participation as a candidate in the election would not have conflicted with the requirements of section 1017(e)(1)(A)(i).

2. The Department's authority to determine that Ms. Stephenson was not a management official under section 1002(12)

Finally, you state that the Department of Labor lacks the statutory authority to determine whether Ms. Stephenson, as Dean of the LMS, was a "management official," because you allege this is the equivalent of determining a new bargaining unit position and can be determined only by the Foreign Service Labor Relations Board. In determining that Ms. Stephenson had been eligible to run for office under section 1017(e), the Department did not determine a new bargaining unit position. Instead, the DOE Chief simply determined that Ms. Stephenson was not a "management official" subject to the "cooling off" period, and thus could run for office. This determination is squarely within the purview of OLMS in administering the FSA Standards of Conduct provisions. Therefore, I do not find that DOE Chief Hanley's determination was arbitrary and capricious.

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 DOE Chief Hanley's decision to dismiss your complaint.

Sincerely,

[redacted]

Michael Hayes
Director