

[REDACTED]

Dear [REDACTED]

This is in response to your letter of July 19, 2011, requesting a review of the dismissal of your complaints concerning the supervised election of the officers of the Antilles Consolidated Education Association (ACEA).¹ Your complaints were dismissed by District Director (DD) Takiia Anderson, of the Atlanta District Office of the Office of Labor-Management Standards (OLMS), in letters dated March 2, 2011, March 7, 2011², and April 12, 2011.

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), 29 U.S.C. §§ 401(a)-(g). The Department's interpretative bulletin on union officer elections under the LMRDA at 29 CFR Part 452 also applies 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 Chief of the OLMS Division of Enforcement (DOE) 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

¹ As a result of a prior investigation, OLMS determined that there were violations that affected the outcome of an ACEA officer election held in April 2010. Thus, after securing a voluntary compliance agreement, OLMS conducted a supervised rerun election on March 24, 2011.

² Two dismissal letters were dated March 7, 2011.

Statement of Reasons³, “[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 appeal and the material provided therein. For the reasons identified below, I have determined that DD Anderson had sufficient basis to dismiss your complaints, and that the OLMS Division of Enforcement was not arbitrary and capricious when it certified the OLMS-supervised election of the ACEA on March 24, 2011.

You requested that OLMS review dismissals of your following eight complaints regarding the OLMS-supervised election of the Antilles Consolidated Education Association on March 24, 2011.

1. Allegation that Union’s Election Chairperson Favored the Incumbent President

In your pre-election protest dated February 7, 2011, you alleged that the election committee chair, ██████████, was unfit for the position and should have been replaced because she favored the incumbent president. You based your allegation on comments ██████████ made at the pre-election conference and the following day’s candidates’ meeting. In your complaint, you stated that ██████████ is a “resource of the union,” and should not be allowed to favor any candidate.

In dismissing your protest and deciding that ██████████ was fit to serve as election chair, DD Anderson explained in the March 2, 2011 dismissal letter that ██████████ was duly appointed by the President in accordance with Article 1, Section 2(a) of the union’s bylaws and that ██████████ had experience in conducting ACEA elections. As OLMS was supervising the election, DD Anderson further explained that OLMS would be working with the election committee to ensure that the election was conducted in accordance with the provisions of the CSRA and the LMRDA. The DD did not find that the verbal exchanges between you and ██████████ disqualified her from serving as election chair or that they violated the CSRA or LMRDA. The DD’s letter explained that it is within a member’s right to speak freely. You did not provide any significant analysis in your request for review as to why this conclusion was arbitrary or capricious. Therefore, I do not find the DD’s conclusion to be arbitrary and capricious.

Union officials and employees retain their right to participate in the affairs of the union and even to support candidates so long as such campaigning does not involve the

³ Since your appeal concerns allegations surrounding an OLMS-supervised rerun election, this review focused on the dismissal letters by the OLMS Atlanta District Office, which were reviewed and affirmed by the DOE Chief in her decision to certify the results of the supervised election.

expenditure of union funds to campaign. See 29 CFR § 452.76. The meetings where these exchanges took place may have involved some expenditure of union funds but you were both present at the meetings, and you both had the opportunity to exchange remarks. There was no use of union funds to promote the candidacy of one individual over another.

2. Allegation that Use of Union Newspaper Promoted the Incumbent President

In your pre-election protest dated February 3, 2011, you alleged that the incumbent president campaigned in an article that appeared in ACEA's October newsletter. In the March 7, 2011 dismissal letter, DD Anderson explained that the timing of the letter did not support a finding that the article was campaign material. Your complaint was accordingly dismissed. The OLMS investigation revealed that the article in question was written on May 5, 2010, and submitted to the printer for proofreading on September 27, 2010 – before OLMS disclosed on October 13, 2010 that there was probable cause to believe that the April 2010 election was not held in accordance with the CSRA and that a rerun election would be required. The article, originally scheduled to appear in the August edition of the newsletter, appeared in the October 2010 edition of the newsletter due to a scheduling conflict and the demand to publish other articles.

You did not provide any significant analysis in your request for review as to why this conclusion was arbitrary and capricious. Since DD Anderson's findings indicate that the newsletter was not campaigning in the context of the supervised election, I find that her conclusion was not arbitrary and capricious.

Courts examine the timing, tone and content of written materials to determine whether those materials are campaign material urging the election of one candidate over another. Here the timing of the submission of article does not support a finding that the article was campaign material urging the election of the incumbent president. The regularly scheduled election had concluded and no supervised election had been agreed to or discussed at the time the article was submitted for publication. The content of the article also would not support a finding that the article was campaign literature. The content was not promotional. The article thanks members for their votes in the regular election, states that the president-elect will carry out his duties to the best of his ability and then reports on bargaining.

3. Allegation that Union's Attorney Distributed Emailed Letter to Favor the Incumbent President

In your pre-election protest dated February 3, 2011, you alleged that the union's attorney emailed a January 13, 2011 letter regarding the upcoming election in an attempt to improve the incumbent president's image following the OLMS investigation. In the March 7, 2011 dismissal letter, DD Anderson indicated that the Election Supervisor's review of the letter revealed that its contents did not violate the CSRA or the LMRDA.

You did not provide any significant analysis in your request for review as to why this conclusion was arbitrary and capricious. The email could be construed as tending to exculpate the president of responsibility for the prior (flawed) election. However, the email does not name this candidate and does not urge his election. The content of the email is factual rather than promotional or hortatory in nature. Since DD Anderson's findings indicate that the letter did not promote any particular candidate, but merely explained the circumstances leading to the supervised election, I find that her conclusion was not arbitrary and capricious.

4. Allegation Regarding the Decision to Permit "Write-In" Votes

In your pre-election protest dated February 16, 2011, you alleged that the decision to permit "write-in" votes would allow the incumbent president more avenues to exploit prohibited election practices. You also alleged that the determination that no candidates' debate would take place was because the incumbent president refused to participate in a candidates' meeting. In the March 7, 2011 dismissal letter, DD Anderson indicated that "write-in" votes were permitted in the challenged election as prescribed in the union's constitution and bylaws. Further, DD Anderson indicated that the union has not had a past practice of arranging for a candidates' debate, and added that the union's constitution and bylaws do not require such a debate. DD Anderson concluded that these allegations do not constitute violations of the CSRA or LMRDA.

You did not provide any significant analysis in your request for review as to why this conclusion was arbitrary and capricious. As "write-in" votes are allowed under the union's constitution and bylaws, and candidates' debates are not required, and DD Anderson did not find a past practice of arranging for a candidates' debate, I find that her conclusion was not arbitrary and capricious.

5. Allegation that Incumbent President Campaigned During a Meeting at Ramey School One Week Before Election

In your post-election protest dated March 24, 2011, you alleged that the incumbent president visited Ramey School one week before the election and may have engaged in campaigning while meeting with school members. In the April 12, 2011 dismissal letter, DD Anderson indicated that investigation of this allegation revealed that the incumbent president visited the Ramey School one week before the election to attend the monthly school board meeting and to meet with three union members to discuss matters concerning their bargaining rights. DD Anderson indicated that no LMRDA or CSRA violations occurred.

You did not provide any significant analysis in your request for review as to why this conclusion was arbitrary and capricious. Since DD Anderson's findings indicate that the incumbent president's meetings at the school were unrelated to the election, I find that her conclusion was not arbitrary and capricious.

6. Allegation that Illegal Campaign Activity Occurred When Incumbent President Emailed Article on March 23, 2011

In your post-election protest dated March 24, 2011, you alleged that the incumbent president illegally campaigned when he used the employer's computer and email resources to email an article concerning grade inflation to union members on March 23, 2011. You also note that the incumbent president's email message included a reminder to vote in the upcoming election.

You did not provide any significant analysis in your request for review as to why the dismissal of your complaint was arbitrary and capricious. Since the article in question, as well as the email, did not promote any candidate for office, I find that DD Anderson's conclusion⁴ was not arbitrary and capricious.

7. Allegation that Election Committee Member Promoted the Incumbent President in Short Conversations with Voters Before They Voted at Polling Site

In your post-election protest dated March 24, 2011, you also alleged that an election committee member (Ramey School's union faculty representative) promoted the incumbent president by making comments to voters before they voted at the Ramey School polling site. In the April 12, 2011 dismissal letter, DD Anderson indicated that investigation of this allegation revealed that the election committee member recommended to some of the teachers that they should vote in the morning since the polls would close at 7:30 a.m. and they would have to wait until the polls reopened at 3:15 p.m. to vote. The dismissal letter stated that the OLMS investigator stationed at the polling area verified that at no time did she hear the election committee member or anyone else say anything positive or negative in an attempt to influence voters.

You did not provide any significant analysis in your request for review as to why the dismissal of your complaint was arbitrary and capricious. Since DD Anderson indicated that OLMS investigators were in the polling area and did not confirm your allegation, and since the investigation did not reveal any evidence that the election committee member attempted to influence voters, I find that the DD's conclusion was not arbitrary and capricious.

⁴ The April 12, 2011 dismissal letter from DD Anderson contains a typographical error. In the first full paragraph on page two, the last sentence reads, "It was determined that either the article or the message that reminded members about the election was a form of campaigning or a violation of utilizing employer's resources." Read literally, the sentence makes little sense. (An election reminder is not electioneering.) Further, the dismissal letter as a whole rejects the appeal in its entirety. Therefore, when read alone or in context, the sentence was plainly intended to state that "**neither** the article **nor** the message" constituted employer financed campaigning. Emphasis added. The identification of this typographical error does not change the outcome of my determination concerning this allegation.

8. Allegation that the Ramey School Polling Site Compromised Voter Secrecy

In your post-election protest dated March 24, 2011, you alleged that voter secrecy was compromised at the Ramey School polling site. In the April 12, 2011 dismissal letter, DD Anderson stated that the OLMS investigator supervising the election at the Ramey School polling site directed your observer ([REDACTED]) to sit to prevent her from viewing the voters' ballot choices. OLMS investigation revealed that your allegations that the polling site compromised voter secrecy were not substantiated. Specifically, the investigation, as described in the dismissal letter, focused on whether secrecy could have been compromised, and concluded that it had not, since no one could see ballot markings while seated and no one stood during the election or approached the voting area.

Further, you did not provide any additional significant analysis in your request for review as to why the dismissal of your complaint was arbitrary and capricious. I therefore find that DD Anderson's conclusion was not arbitrary and capricious.

For the reasons discussed above, I find that there was a reasoned basis for the dismissal of your complaints and that the dismissal of your complaints was not arbitrary and capricious. Therefore, I affirm the OLMS Atlanta District Office District Director's decision to dismiss your complaints concerning the supervised election of ACEA officers, as well as the DOE Chief's decision to certify the results of the supervised election.

Sincerely,

John Lund, Ph.D.
Director

cc: ACEA President
Chief, OLMS Division of Enforcement
OLMS Atlanta District Office