



November 13, 2020



Dear [REDACTED]

This is in response to your May 17, 2020 appeal, received by the Department of Labor on May 20, 2020, as well as a May 19, 2020 addendum to your appeal, received on May 21, 2020, requesting a review of the April 17, 2020 Statement of Reasons (SOR) dismissing your complaint concerning the union-ordered rerun election of union officers conducted by National Treasury Employees Union (NTEU), Chapter 22, on April 24, 2018. I also reviewed the investigative file. Your complaint was dismissed by Brian Pifer, then-Chief of the Division of Enforcement (DOE) of the Office of Labor-Management Standards (OLMS). For the reasons that follow, I dismiss your appeal.

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). The CSRA 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 regulation at 29 C.F.R. § 458.29 adopts the officer election provisions of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), 29 U.S.C. §§ 481(a)-(g). The Department's regulations on union officer elections under the LMRDA at 29 C.F.R. part 452 also apply to union 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 C.F.R. § 458.1.

I. Standard of Review

The regulations provide for review of the determination dismissing 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 C.F.R. § 458.64(c); see also *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, as well as then-DOE Chief Pifer’s dismissal. For the reasons identified below, I have determined you did not timely appeal and, therefore, dismiss your appeal. In the alternative, I have determined that the DOE Chief did provide a reasoned basis for the dismissal of your complaint and that, as a result, the dismissal was not arbitrary and capricious.

II. Late Filing of Appeal

Initially, I will note that your appeal fails on procedural grounds because your appeal was received after the deadline of 15 days. 29 C.F.R. § 458.64(c). The DOE Chief’s SOR was dated April 17, 2020, and mailed the same day, while the date of your letter was May 17, 2020, and your appeal was received by the Department on May 20, 2020. Thus, I dismiss your appeal on procedural grounds, as being untimely. In the alternative, I have conducted a full review to determine whether the decision to dismiss your complaint was arbitrary and capricious.

III. Background

You submitted your initial complaint to OLMS on September 25, 2019 in connection with the April 24, 2018 union-ordered rerun election of Chapter 22 officers conducted by the NTEU. In response to the April 17, 2020 SOR dismissing your complaint, you raised four allegations in your May 17, 2020 protest to the Secretary of Labor appealing such dismissal. One allegation raised involved whether the union properly applied a candidate qualification that prohibited supervisors from running for office. The three additional allegations raised dealt with use of employer and union funds to campaign and whether there was disparate candidate treatment and a failure to provide adequate safeguards in regard to campaigning.

Below I address each of these allegations individually.

IV. Issues Presented in Your Appeal

A. Alleged Ineligibility of MarCherie Williams to run for chapter office

The first allegation in your appeal is that Chapter 22 violated section 401(e) of the LMRDA when it permitted MarCherie Williams, who was detailed as a temporary supervisor from January 2018 to May 2018, to run as a candidate in the rerun election. According to your complaint and appeal, MarCherie Williams was not eligible to run for chapter office because she was on a supervisory detail at the time of the rerun election on April 24, 2018.

The DOE Chief wrote in his April 17, 2020 SOR that section 401(e) of the LMRDA provides that every member in good standing is eligible to be a candidate in the election, subject to reasonable qualifications uniformly imposed. 29 U.S.C. § 481(e). This section also requires a

union to conduct the election in accordance with its constitution and bylaws. *Id.* Part VII, Section 2 of the NTEU Chapter 22 bylaws provides, “Any active member in good standing is eligible to run for office with the exception of . . . employees considered supervisors in accordance to law and regulation.”

The Department defers to a union’s interpretation of its constitution and bylaws as long as that interpretation is not clearly unreasonable. See 29 C.F.R. § 452.3. The DOE Chief explained in his April 17, 2020 SOR that the investigation revealed that it is common practice to allow Chapter 22 officers to complete temporary supervisory details:

At the time Ms. Williams was nominated during the September 2017 regularly-scheduled election, she was not detailing as a supervisor and thus was eligible to run as a candidate. In ordering the rerun election, NTEU did not require Chapter 22 to conduct new nominations; as such, because Ms. Williams was properly nominated and eligible to run as a candidate in the September 2017 regularly scheduled election, she was an eligible candidate in the rerun election. Given that unions are afforded a high degree of discretion to conduct union-ordered rerun elections, Chapter 22’s actions, with respect to this allegation, do not constitute a violation of the LMRDA.

You challenged the SOR’s determination, as you do not consider the Chapter 22 bylaws as applying only to the nomination process. To support your conclusion, you cited an SOR issued by OLMS on August 10, 2016 concerning NTEU Chapter 270, which you claim supports your interpretation of the policy that a candidate is not eligible to run if on a supervisory detail at the time votes are counted. However, the SOR actually stated that: “Chapter 19 of the NTEU Chapter Manual provides that members who are detailed to a non-bargaining unit position are not eligible to run for office unless their detail will end before the *beginning of the term of office* (emphasis added).”

Here, according to your appeal, Ms. Williams finished her detail on May 12, 2018, just after the April 24, 2018 election, and, according to an email you cited between you and an NTEU counsel, the key issue concerned whether Ms. Williams would finish the detail before beginning her term in office. The NTEU Counsel stated her belief that Ms. Williams would finish the detail before starting her term. Accordingly, even if I considered new facts raised on appeal, the facts that you raised are consistent with the 2016 SOR you cited, as well as the April 17, 2020 SOR from which you appeal. The DOE Chief reasonably concluded that no violation occurred with respect to Ms. Williams’ candidacy.

B. Posting of campaign materials on King of Prussia and Philadelphia Post of Duty walls

In your appeal letter, you allege that the DOE Chief incorrectly concluded that the posting of campaign posters on bulletin boards, walls, and hallway walls in the King of Prussia Post (KOP) of Duty were immediately removed and that therefore any effect of the violation was mitigated. Regarding the King of Prussia site, you state in your appeal that the DOE Chief provided no evidence as to how the campaign material was immediately removed. The DOE Chief stated in the SOR that “a supervisor at the facility immediately removed the campaign literature.” In your appeal, you attempted to cast doubt as to this factual conclusion by stating that “prior reports

indicated that this KOP supervisor had refused to speak with the DOL investigator.” You then concluded that your opponent must have informed OLMS that a supervisor immediately removed the campaign literature. You also stated that you, “learned about this incident from a member, therefore, at least one other person had seen it.” However, in your appeal, you provided no further indication as to what “prior reports” you were referring to, nor did you provide any indication as to the identity of the member with contrary evidence. Moreover, while you state that we should assume an effect on the outcome of the election absent evidence to the contrary, the DOE Chief did cite evidence to the contrary (i.e. the immediate removal of the material). In any event, review of the Secretary’s decision does not generally extend to the complaining member’s challenges to the factual bases of the Secretary’s conclusions. *Bachowski*, at 573. Thus, I cannot determine that the DOE’s conclusion was unreasonable.

Regarding the Philadelphia site, the DOE Chief found that the material posted on the bulletin boards was the same as materials included in a permitted desk drop. In your appeal, you state that you were provided no evidence that a desk drop actually occurred, and that we should assume an effect on the outcome of the election absent evidence to the contrary, particularly since you stated that “employees could be more influenced on something they see on an official IRS bulletin board” than by material placed on their desks. I note you provided no information in your appeal, such as the names of witnesses, indicating that no one “desk dropped” campaign materials or that campaign material on a bulletin board had greater influence than identical material seen on a desk. More important to the disposition of this appeal, review of the Secretary’s decision does not generally extend to the complaining member’s challenges to the factual bases of the Secretary’s conclusions. *Bachowski*, at 573. As a result, the DOE Chief had a reasonable basis to dismiss these allegations and it was not arbitrary or capricious to do so.

C. Publication of a April 7, 2017 union email to your opponent’s campaign website

In your appeal letter, you objected to the DOE Chief’s conclusion that there was no violation regarding your opponent’s posting of your April 17, 2017 email on his campaign website. Section 401(g) prohibits the use of union and employer funds or resources to promote the candidacy of any candidate in an election. 29 U.S.C. § 481(g). The DOE Chief explained in his SOR that the IRS permits union officers to use the IRS email system for union business, and that your opponent, consistent with his regular practice, forwarded the email to his private email address. He later posted your April 7, 2017 email to his campaign website using his private computer. The DOE Chief found no violation because he only used his personal email address and computer, not employer or union resources, to post your email on his campaign website. On appeal, you argued that this decision was incorrect because the email itself was a union asset that your opponent originally forwarded from his government computer to his personal computer. There is no indication in the SOR, nor do you offer any in your appeal, that the email itself was a confidential union document or otherwise a union asset within the meaning of 401(g). Therefore, the DOE’s Chief’s conclusion was reasonable.

Moreover, even if the email itself constitutes a union asset for purposes of LMRDA section 401(g), you did not identify any witnesses or provide other evidence to substantiate any impact

on the outcome of the election.¹ In any event, review of the Secretary's decision does not generally extend to the complaining member's challenges to the factual bases of the Secretary's conclusions. *Bachowski*, at 573. Consequently the DOE Chief's dismissal of this allegation was not arbitrary or capricious.

D. Publication of December 15, 2017 and January 12, 2018 decision letters to campaign websites

In your appeal letter, you challenged the DOE Chief's conclusion with respect to two decision letters issued to you, dated December 15, 2017, and January 12, 2018. You argued that the DOE Chief failed to consider that the union treated you unfairly because it did not provide you with your opponent's decision letters, nor with his appeal, and that therefore you were not given the same treatment as your opponent. However, you did not make this allegation in your initial election protest to OLMS, so I cannot consider it now on appeal.² In your election protest to OLMS, you alleged that Mr. Fenton improperly published the December 15 and January 12 decision letters to his campaign website. These were letters that the national union issued to you related to your election protests. In his SOR to you, the DOE Chief properly addressed this issue. He noted that even if they could be construed as union resources as the term is used in section 401(g) of the LMRDA, both candidates used the letters or their contents similarly to campaign. For example, you published excerpts of your copy of the December 15, 2017 decision letter to your campaign website, and included commentary about your opponent and other Team Horatio candidates alongside those excerpts.

On appeal, you inquire as to how your opponent received them and why OLMS did not investigate the matter further. However, the SOR stated that your opponent received the letter as the Chapter 22 incumbent president. Additionally, in response to the SOR's conclusion that both parties had access to your election letters, you stated that you did not use your decision letter in a similar matter to your opponent. However, you did not provide evidence that challenged the conclusion that both sides had access to the December 15 and January 12 decision letters and that both sides used them for campaigning, even if the methods of campaigning differed.

Therefore, for the reasons discussed above, even had I not dismissed your case on procedural grounds, I would have found that there was a reasoned basis for the dismissal of your complaint.

Sincerely,

Andrew Auerbach
Acting Director

¹ In your appeal addendum, you argued that you were unable to campaign similarly by posting multiple emails from the IRS system to your campaign website. However, the allegation you raised below was specific to your April 7, 2017 email (to which you had the same access as your opponent) and thus this new issue in your appeal addendum is beyond the scope of your original complaint and, consequently, this appeal.

² In your appeal, you also raised issues concerning the geographic scope of Chapter 22's membership, which you did not raise in your election protest and which will not be considered here.