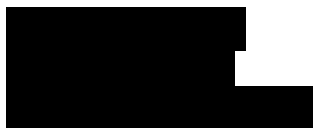




November 22, 2022



Dear [REDACTED]:

This Statement of Reasons is in response to the complaint you filed with the United States Department of Labor on January 27, 2022, alleging that violations of Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), occurred in connection with the mail ballot election of officers held by the International Union of Operating Engineers, Local 3, on September 1, 2021.

The Department of Labor (Department) conducted an investigation of your allegations. As a result of the investigation, the Department has concluded, with respect to the specific allegations, that there was no violation of the Act that may have affected the outcome of the election. Following is an explanation of this conclusion.

First, you alleged that the incumbent slate used addresses that it obtained from the union's computers and database system to mail letters to union staff members requesting monetary donations for the slate's campaign. Section 401(g) of the LMRDA prohibits the use of union funds to promote the candidacy of any person in an election of union officers. 29 U.S.C. § 481(g); 29 C.F.R. § 452.73. Accordingly, officers and employees may not use union funds, facilities, equipment, stationery, etc., to assist them in campaigning. 29 C.F.R. § 452.76.

The investigation disclosed that union officials did not use the union's computer or data system to obtain addresses or other contact information of union staff members. The investigation found that volunteers called staff members to obtain staff members' home addresses. Volunteers also met with staff members in-person during the staff members' lunch or break times and obtained their contact information. The investigation also found that the incumbent slate used staff members' contact information that volunteers had collected from previous elections for the slate's 2021 election campaign.

However, during the investigation one of your witnesses, a staff member, stated that he did not provide his home address to the incumbent slate, but he received a donation letter in the mail at that address. The Department's review of the slate's campaign pledge form revealed that the staff member's name, home address, cell phone number,

and personal email address had been written on the form by hand. A union official who sponsored a campaign dinner at a restaurant stated during the investigation that your witness voluntarily wrote his contact information on the incumbent slate's campaign pledge form during the dinner. During the investigation, your witness admitted that he attended the dinner, and that he could not recall if he provided his contact information at the dinner or whether he provided that information to volunteers or union officers during the 2018 election. The LMRDA was not violated.

You also alleged that union staff members felt threatened with loss of employment if they did not donate money to the incumbent slate's election campaign. Section 401(e) of the LMRDA expressly provides for the right of a member to vote for and otherwise support the candidate or candidates of his choice without being subject to penalty, discipline, or improper interference or reprisal of any kind by the labor organization conducting the election or any officer or member thereof. 29 U.S.C. § 481(e); *see also* 29 C.F.R. §§ 452.82, 452.105.

During the investigation one of your witnesses, a former business agent, stated that he was laid off from that position and partially attributed the layoff to his failure to donate money to the incumbent slate's campaign. The investigation found, however, that he was laid off because his representation duties with a labor association ended after that association terminated its affiliation with Local 3. Your other witness, a former business agent, admitted during the investigation that he was terminated from that position due to poor performance. He also stated that before his termination he did not feel threatened with the loss of his job if he did not donate money to the incumbent slate's campaign, that he voluntarily gave the \$1,000 donation that the incumbents suggested, and that he felt his donation was somehow helping the union.

In addition, the Department interviewed Local 3 personnel who are members of the local and did not donate any money to the incumbent slate's 2021 election campaign or gave only a portion of the amount of money the incumbents suggested for a donation. None of these members stated that they felt threatened with loss of employment if they did not donate money to the incumbent slate's campaign. Further, the investigation found that during the election the union did not improperly interfere with or infringe upon any member's attendant rights of membership in the union. The LMRDA was not violated.

Next, you alleged that the District 80 incumbent officers manipulated the voting process to favor their candidates for the District 80 election committee and extended the voting hours to increase voter turnout that was supportive of such candidates. The LMRDA governs only the election of union officers. 29 U.S.C. § 481. The District 80 election committee member is not an "officer" of Local 3, as that term is defined in Section 3(n) of the LMRDA. 29 U.S.C. § 402(n), 29 C.F.R. § 452.17. Therefore, even if this allegation

were true, it would not constitute a violation of the LMRDA. The LMRDA was not violated.

Also, you raised allegations concerning the nominations process. You alleged that a union officer's delay in responding to your question about the nomination forms created a hardship for opposition candidates. You also asserted that only nomination forms approved and provided by the election committee could be used to collect nominators' signatures. As a result, opposition candidates had to wait until such forms were available before they could start collecting the signatures needed for nomination to office. You further asserted that candidates were required to obtain the signatures of 200 eligible members for nomination to office, that is requirement made it difficult to be nominated, and that candidates had to include each nominator's register number on the nomination forms. Section 401(e) of the LMRDA requires that members be given a reasonable opportunity for the nomination of candidates. 29 U.S.C. § 481(e); *see also* 29 C.F.R. §§ 452.55-59.

With respect to your allegation that a union officer delayed his response to your question about the nomination forms, the investigation found that in a letter dated January 25, 2021, you submitted several questions to Local 3's recording corresponding secretary about nominations, including a question about the nomination forms. In a letter dated January 26, 2021, the recording corresponding secretary informed you that only the election committee could respond to your questions and that the election committee would not be selected until March 2021. After the election committee was selected, nomination forms were made available at the union's district offices beginning April 14, 2021.

The investigation disclosed that candidates were required to use the nomination forms provided by the election committee on April 14 to collect the signatures needed for nomination to office. However, this requirement was applied equally to all candidates, including the incumbent slate. In addition, although you complained that candidates were required to obtain the signatures of 200 eligible members for nomination to office, each of the candidates on your slate obtained more than the requisite number of signatures and their names were placed on the ballot. Finally, although Article XII, Section 2(e) of Local 3's 2020 bylaws provides that nomination forms must include the last four digits of each nominator's social security number and complete register number, the union did not enforce this rule during the election. In fact, the nomination forms stated that if other identifying information was included on that form a register number would not be required. Ultimately, the investigation found that no candidates, including the members of your slate, were disqualified from candidacy because their nomination forms did not include nominators' register numbers. The LMRDA was not violated.

Moreover, you alleged that the union allowed election committee members to post their pictures and biographical information in the May 2021 edition of the Engineers News, but opposition candidates were not afforded that same opportunity. Section 401(g) of the LMRDA prohibits the use of union funds to promote the candidacy. 29 U.S.C. § 481(g); 29 C.F.R. § 452.73. Accordingly, a union may neither attack a candidate in a union-financed publication nor urge the nomination or election of a candidate in a union-financed letter to the members. 29 C.F.R. § 452.75.

The investigation found that the May 2021 edition of the local's newsletter, the Engineers News, included the pictures and biographical statements of each member of the election committee to introduce them to the membership. None of these members were candidates in the election. Also, the biographical statements did not solicit members' votes, or provide information supportive of any slate, including the incumbent slate. In addition, the union did not publish the biographies of any candidate for union office in the newsletter during the election. Further, a review of the newsletters issued prior to the election found that the May 2021 newsletter did not contain an unusual amount of coverage or photos of the incumbent officers. The LMRDA was not violated.

Further, you alleged that an incumbent business manager used union funds to purchase \$30 gift cards and distributed these cards along with the incumbent slate's campaign flyers to members who attended a drive-through picnic held in Oahu, Hawaii. Section 401(g) of the LMRDA prohibits the use of union funds to promote the candidacy of any person in an election of union officers. Accordingly, officers and employees may not use union funds, facilities, equipment, stationery, etc., to assist them in campaigning. 29 C.F.R. § 452.76.

The investigation found that the Oahu, Hawaii drive-through picnic was hosted by the Hawaii Operating Engineers Industry Stabilization Fund (fund). The picnic was held on the public street and sidewalks near the union's office and three canopies were set up to accommodate various activities. The investigation found that lunches were handed out at the first canopy by volunteers and union staff members. The \$30 gift cards were distributed at the second canopy by the fund's workers. Volunteers for the incumbent slate and a union official handed out campaign flyers at the third canopy. However, attendees were not required to accept the campaign flyers as a condition of receiving the \$30 gift cards, other gifts, or food. These flyers were handed out separately from the \$30 gift cards and other giveaways. Further, the incumbent candidates who attended the picnic greeted members but did not hand out any gift cards, giveaways, or campaign flyers. The LMRDA was not violated.

You alleged that the election was not conducted in accordance with Article XII, Section 3(d) of Local 3 bylaws because the local did not mail a separate postcard to members

notifying them of the election. Section 401(e) of the LMRDA provides that a union must conduct its election in accordance with its constitution and bylaws. 29 U.S.C. § 481(e); 29 C.F.R. §§ 452.2, 452.109.

The investigation found that Article XII, Section 3(d) of the 2020 Local 3 bylaws provides that the election committee is responsible for giving notice of the election, by mailing a printed notice to each member of the local at the member's last known address. However, this provision does not require the local to mail a separate notice of the election by postcard to members. The investigation found that the local mailed a postcard to members during the 2018 election to provide information that was inadvertently left off the original printed election notice. Ultimately, the 2021 election notice was printed in the union newsletter and timely mailed to members' last known home addresses. The LMRDA was not violated.

You also alleged that the election committee did not take steps to obtain updated mailing addresses for eligible voters whose ballots were returned as undeliverable. Section 401(e) of the LMRDA ensures the right of every eligible member to vote for and otherwise support the candidate or candidates of the member's choice. 29 U.S.C. § 481(e); 29 C.F.R. § 452.84. In a mail ballot election, the right of every eligible member to vote must require at a minimum that a union take reasonable steps to maintain current mailing addresses for its members and to distribute election ballots to all those entitled to vote.

The investigation found that the election committee took reasonable steps to maintain current mailing addresses for its members and to obtain updated home addresses for members whose ballots were returned as undeliverable. The investigation disclosed that on April 6, 2021, the election service the local hired to assist in conducting the election mailed 37,063 ballots to eligible voters. Of these ballots, 1,712 were returned as undeliverable. The local was able to obtain updated home addresses for 753 members whose ballots were returned as undeliverable. Replacement ballots were mailed to those updated addresses. The election service mailed an additional 117 duplicate ballots to members who requested them. In addition, the election service immediately remailed undeliverable ballots to the forwarding address labels that had been affixed to the ballot packages by the U.S. Postal Service. The LMRDA was not violated.

You alleged that the ballots were not secret because after they were marked and sealed inside their return ballot envelopes, a person could see how a ballot was marked by holding the ballot envelope up to a flashlight. Section 401(b) of the LMRDA provides that a local must elect its officers among its members by a secret ballot vote. 29 U.S.C. § 481(b); 29 C.F.R. § 452.26. A secret ballot under the LMRDA includes the expression by ballot of a voter's choice of candidates that is cast in such a manner that the voter cannot be identified with the choice expressed. 29 C.F.R. § 452.97(a).

The investigation did not disclose any evidence that ballot secrecy was compromised during the election process. In fact, after members mailed back their voted ballots, such ballots remained in the sole custody of the Airport Oakland post office. No Local 3 members worked at that postal facility. The ballots remained undisturbed until the morning of September 1, 2021, when an election official picked up the ballots from the post office for counting. During the ballot retrieval, the election official sealed the ballots in secured bins before transporting the ballots to the union hall. Election committee members and observers from both slates accompanied the election official to the post office to pick up the ballots, during the transportation of the ballots from the post office to the union hall, and when the election official delivered the bins containing the ballots to election personnel at the union hall.

The election official and the election committee members and observers who accompanied him to the post office to pick up the ballots did not witness anyone holding ballot envelopes up to a light or using a flashlight to try and read the ballots while the ballots were being retrieved from the post office. Further, none of these individuals witnessed the alleged activity after the bins containing the ballots were unsealed at the union hall so that the ballots could be counted or during the ballot count and tally. The LMRDA was not violated.

You alleged that the incumbent candidates took photos with members outside an employer facility while the members were on employer paid time and that these photos were used in the incumbents' campaign mailers. You also alleged that the incumbent officers campaigned at employer job sites. Section 401(g) of the LMRDA prohibits the use of union funds to promote the candidacy of any person in an election. Accordingly, officers and employees may not campaign on time that is paid for by the union, nor use union funds, facilities, equipment, stationery, etc., to assist them in such campaigning. 29 C.F.R. § 452.73. Section 401(g) also prohibits the use of employer funds for campaigning. 29 U.S.C. § 481(g). This prohibition includes any costs incurred by an employer, or anything of value contributed by an employer to support the candidacy of any individual in an election. 29 C.F.R. § 452.78.

The investigation found that incumbent candidates took photos with members outside of a job site while the members and the incumbents were on personal time and took photos with members inside a restaurant while the candidates and the members were on a lunch break or personal time. The incumbent candidates took other photos of members while the members were standing on a public access road leading to a job site. The investigation found that at the time these photos were taken members were on break time or lunch time and the candidates were on personal time. The investigation further found that there were no strict rules on campaigning at job sites and all requests

to campaign at job sites would have been granted. No candidates were prevented from engaging in such campaigning, including your slate. The LMRDA was not violated.

You alleged that the election committee did not follow the bylaws provision requiring that the sample ballot indicate next to the incumbent candidates' names whether such candidates had been appointed or elected. Section 401(e) of the LMRDA provides that a union must conduct its election in accordance with its constitution and bylaws. 29 C.F.R. §§ 452.2, 452.109.

The investigation found that the bylaws required that the designation of "appointed" or "elected" be printed next to the incumbents' titles on the official ballot. These designations were left off the sample ballots published in the July 2021 newsletter but were included on the sample ballot published in the August 2021 newsletter. Further, the official ballot included the candidates' proper designations. The LMRDA was not violated.

You alleged that a union office secretary incorrectly informed a member that he could not receive nomination forms by email. Section 401(c) of the LMRDA contains a general mandate requiring a union to provide adequate safeguards to ensure a fair election. Thus, a union is bound by a general rule of fairness in conducting its election of officers. 29 U.S.C. § 481(d); 29 C.F.R. § 452.110. Section 401(e) of the LMRDA requires that members be given a reasonable opportunity for the nomination of candidates. 29 U.S.C. § 481(e); 29 C.F.R. §§ 452.55-59.

The investigation found that a dedicated email address and toll-free phone number was set up so that election-related questions could be directed to and answered by the election committee. However, neither you nor any member of your slate contacted the election committee about the availability of the nomination forms by email. Ultimately, the member picked up a nomination form from the union office, secured the required number of signatures needed for nominations to office, and his name was placed on the ballot. The LMRDA was not violated.

You alleged that an employer supported the incumbent treasurer and the incumbent slate by posting a campaign message on their Facebook page. Section 401(g) of the LMRDA prohibits the use of employer funds to promote the candidacy of any person in an election. 29 C.F.R. § 452.78. This prohibition against the use of "employer" money operates to include an employer's contribution of anything of value to union election campaigns. Section 3(e) of the LMRDA defines the term "employer" to include "any person acting . . . as an agent of an employer in relation to an employee." 29 U.S.C. § 402(e). This language defining employer therefore appears to include managers who are responsible for the employer-employee relationship on behalf of a corporation.

The investigation found that the director is responsible for developing and implementing labor relations strategy and policy, and negotiating and administering over 125 collective bargaining agreements in 28 states, on behalf of a corporation. Assuming the corporation employs “employees,” as that term is defined in Section 3(f) of the LMRDA, 29 U.S.C. § 402(f), it appears that the director acts as an agent of an employer in relation to an employee and is responsible for the employer-employee relationship on behalf of that company. The director, therefore, appears to be an “employer” for purposes of the LMRDA. 29 U.S.C. § 402(e).

The investigation found that the director used his personal computer to post a message to the incumbent treasurer’s personal Facebook page stating, “great team and great leaders.” To the extent the director is an employer, there is no evidence that this Facebook post involved the use of employer/corporate funds to promote the candidacy of any person in the election. The investigation found that the post identified the director only by his first and last names. Moreover, the post did not include his job title or the corporation’s name or logo. Further, the director used his personal computer to post the message to the incumbent’s personal Facebook page, while the director was on personal time. Therefore, the Facebook post did not involve the use of any employer or corporate resources. The LMRDA was not violated.

You alleged that a member contacted the election hotline and requested a duplicate ballot but received three separate ballots in the mail. Section 401(c) of the LMRDA contains a general mandate requiring a union to provide adequate safeguards to ensure a fair election. Thus, a union is bound by a general rule of fairness in conducting its election of officers. 29 C.F.R. § 452.110.

The investigation found that a member called the duplicate ballot hotline on two separate occasions and requested a duplicate ballot. In response to each of those requests a duplicate ballot was mailed to the member. The member also received the ballot that was mailed to him during the ballot mailing to the general membership. The investigation found that the member voted and returned only one ballot, which was included in the ballot count and vote tally. Further, the scanner used to count the ballots only counted one ballot for each voter and automatically rejected any additional ballots that may have been returned by the same voter. The LMRDA was not violated.

You alleged that voter secrecy may have been compromised because both the return ballot envelope and the ballot included a barcode. You asserted that someone may have been able to trace the barcodes to the member who voted the ballot. Section 401(b) of the LMRDA provides that a local must elect its officers among its members by a secret ballot vote. 29 C.F.R. § 452.26; 29 C.F.R. § 452.97(a).

The investigation found that both the ballots and the return ballot envelopes contained a barcode. The secret ballot envelope did not contain a barcode. However, the barcodes were not linked and could not be traced to any ballots. The barcode on the return ballot envelope was unique to each member. The barcode on the ballot only identified the member's district and was used to count the district races. Further, each member's ballot was removed from the return ballot envelope containing a barcode while the ballot was still sealed inside its secret ballot envelope. Therefore, no ballot could be identified with its voter. The LMRDA was not violated.

You alleged that an incumbent candidate sent an email from the union to the membership on September 1, 2021, before the ballots were counted, informing members that the incumbent slate had won the election. Section 401(c) of the LMRDA contains a general mandate requiring a union to provide adequate safeguards to ensure a fair election. Thus, a union is bound by a general rule of fairness in conducting its election of officers. 29 C.F.R. § 452.110.

The investigation found that ballots had to be returned to the designated post office box no later than 10:00 a.m., on September 1, 2021, in order to be counted. Earlier that morning, at 9:00 a.m., Local 3's IT department inadvertently sent an email to the membership announcing that the incumbent slate had won the election. Later that morning, the union sent an email to members at 9:32 a.m., retracting the announcement. Further, voted ballots that were returned by the September 1, 10:00 a.m. deadline for the receipt of such ballots and included in the vote tally already had been deposited in the mail by their voters when the IT department sent the announcement. Therefore, even to the extent that the announcement may have violated the Act, it could not have affected the outcome of the election because all eligible ballots had already been received for the tally.

Finally, you alleged that a member was concerned about the validity of the system used to scan the ballots during the ballot count and verification process. The member questioned how the scanner was able to identify his name on the return ballot envelope as that of an eligible voter and recognize and reject the other two ballots that the union mailed him, even though he never voted those ballots. Section 401(c) of the LMRDA contains a general mandate requiring a union to provide adequate safeguards to ensure a fair election.

The investigation found that a scanner was used to tally the ballots. The barcode on each replacement ballot return envelope was linked to the barcode on the original return ballot envelope to prevent a voter from voting more than one ballot in the election. Because these barcodes were linked, the scanner automatically detected when multiple ballots had been mailed to the same member, even if the member had voted only one ballot, and displayed that information on the scanner's screen. The integrity of

the ballot count and vote tally was maintained during the scanning process. The LMRDA was not violated.

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 and I have closed the file regarding this matter.

Sincerely,




Tracy L. Shanker
Chief, Division of Enforcement

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