



September 29, 2011



Dear [REDACTED]

This Statement of Reasons is in response to your September 27, 2009, complaint, which incorporated by reference your earlier complaints, alleging that violations of Title IV of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), 29 U.S.C. §§ 481 - 484, occurred in connection with, among other matters, the election of Association of State Conferences (ASC) Chair, American Association of University Professors (AAUP) conducted on June 12, 2009.

The Department of Labor conducted an investigation of your numerous allegations. As a result of the investigation, the Department concluded that there was a violation that may have affected the outcome of the election for ASC Chair. By letter dated February 4, 2010, AAUP agreed to hold a new election for that position under the supervision of the Department. This statement addresses those allegations in your September 27, 2009, administrative complaint that either were not resolved by the supervised election or that the Department determined were not violations of the LMRDA that affected the outcome of the election.

You alleged that various staff positions and committees were appointed when they should have been elected. Specifically, you alleged the positions of General Counsel and General Secretary, as well as members sitting on the AAUP Grievance Committee, AAUP Nominating Committee, the Election Committee, and the AAUP Panel on Chapter and Conference Sanctions, were "officers" because they perform executive functions, and therefore should have been elected under provisions of Title IV of the LMRDA.

Section 401 of the LMRDA requires, among other things, that officers of a union at the local, intermediate, and national levels must be elected and prescribes minimum standards and procedures for the conduct of such elections. 29 C.F.R. § 452.16. Section 3(n) of the LMRDA defines "officers" to mean any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive function of a labor organization, and any member of its executive board or similar governing body. See 29 C.F.R. §§ 452.17-452.22. Any person who in fact has

executive or policy-making authority is an "officer" even though that person may not be identified as such under the constitution and bylaws of that union. 29 C.F.R. § 452.19. Moreover, a member of any group, committee or board which is vested with broad governing or policymaking authority will be regarded as a member of an "executive board or similar governing body." 29 CFR § 452.20(a). Professional and other staff members of a union who do not determine the organization's policies or carry on its executive functions and who are employed merely to implement policy decisions and managerial directives established by the governing officials of the union are not officers and are not required to be elected. 29 C.F.R. § 452.20(b).

The AAUP constitutional officers are President, First and Second Vice Presidents, and Secretary-Treasurer. Article III, AAUP Constitution. The governing body of the AAUP is the Council, comprised of the President, the Vice-Presidents, the Secretary-Treasurer, the immediate and past chairs of the Assembly of State Conferences (ASC) and the Collective Bargaining Congress (CBC), former presidents for a period of three years immediately following their term as president, and thirty directly elected members. The Council's duties include, among other things, the appointment and determination of salaries of the General Counsel, General Secretary, and Assistant Treasurer and the authorization of establishment of AAUP committees. The Council is authorized to act on behalf of AAUP. There shall be an Executive Committee of the Council which, between meetings of the Council, may exercise such powers as delegated to it. The Executive Committee is comprised of the constitutional officers along with the former and current Chairs of the ASC and CBC, and four of the thirty elected members.

You alleged that the General Counsel performs executive functions for the following reasons: she was not appointed by the Council; she is currently functioning as a voting member of the Executive Committee; the General Counsel is listed on the AAUP website as a member of the Executive Committee; the General Counsel is listed in a section titled "Association Officers" in the November/December 2009 issue of *Academe*; and the powers of the General Counsel include the filing of amicus briefs, which you believe to be an executive function.

The investigation disclosed that the General Counsel, [REDACTED], was appointed in August 2006, by the AAUP Council, as required under the AAUP Constitution. The General Counsel is not a constitutional officer, or a voting member of the Executive Committee. The investigation showed that [REDACTED], as the General Counsel, attends National Council and Executive Committee meetings, providing legal and organizational advice based on her knowledge of the AAUP Constitution, but has no vote. Theoretically, the Executive Council has the right to exclude the General Counsel from any of its meetings. Although the AAUP website displayed the General Counsel under the heading "officers & council" with a subheading "Executive Committee" and *Academe* listed the General Counsel under the title "Association Officers," the

designation assigned on the website or in the magazine is not controlling. *See* 29 C.F.R. § 452.20(a) (the name or title that a labor organization assigns to a position is not controlling).

The General Counsel is not vested with broad governing or policy-making authority. The General Counsel is not involved with AAUP finances, or in mergers of AAUP chapters. The General Counsel does not file amicus briefs on behalf of AAUP; such briefs are drafted and filed by outside counsel performing pro bono work on behalf of AAUP. The investigative findings show that the General Counsel is a professional staff member who implements AAUP policy decisions established by governing officials, and is subject to the Council's supervision. Consequently, the General Counsel is not an "officer" within the meaning of section 3(n) of the LMRDA, 29 U.S.C. § 402(n), and this position is not required to be filled by election. *See* 29 C.F.R. § 452.20(b). There was no violation.

You alleged that members of the Election Committee perform executive functions, and as such, should have been elected rather than appointed. You contend that receiving and responding to election protests constitute executive functions, and that the Election Committee's decisions are final. You challenge the General Counsel's right to vote on the Election Committee, as well as the President's authority to appoint two members of that committee.

Section 401(e) of the LMRDA, 29 U.S.C. § 481(e), requires unions to conduct their elections in accordance with their constitution and bylaws, insofar as those governing documents are not inconsistent with the provisions of Title IV of the LMRDA. The AAUP imposes a requirement that an election committee be established, with the General Counsel serving as chair. Article VIII, AAUP Election Bylaws. The Election Committee's duties include deciding any questions arising under the Bylaws; supervising the counting of the ballots; and receiving and responding to election protests. The election committee is required to report to the Council after each election regarding any complaints filed with the committee and their disposition, and recommend any policy changes for consideration by the Council. The Election Appeals Committee, consisting of three Council members, reviews all appeals and makes the final decision on any decision of the election committee. Art. X of the AAUP Election Bylaws. Under Article III, section 3, "[t]he President shall appoint, and shall be *ex officio* a member of, all committees of the Association except the Nominating Committee, the Election Committee, and the Election Appeals Committee."

The Election Committee is not vested with broad governing or policy-making authority. *See* 29 C.F.R. § 452.20(a). Receiving and responding to election protests are not executive functions. The Election Committee must issue a report to the Council regarding any election protest and explain its resolution of the protest. If the Election

Committee wishes to make changes regarding the conduct of AAUP elections, it can make a recommendation to the Council, the AAUP governing body. Moreover, the Election Committee's election decisions are not final and binding, as only the Election Appeals Committee is authorized to render final and binding election decisions. The Election Committee merely applies election rules established by the governing body, and its capacity to act is of brief duration. Because the Election Committee does not perform executive functions, its members are not required to be elected.

You also challenge the President's authority to appoint election committee members. The AAUP Constitution requires him to do so, but prohibits him from serving as an *ex officio* member of one of three committees, including the election committee. Consequently, even if the President appointed any of the election committee members, he had the authority to do so. There was no violation.

You alleged that members of the AAUP Nominating Committee perform executive functions, and as such, should have been elected rather than appointed. The AAUP is required to conduct its election in conformity with its constitution and bylaws, insofar as they conform to the requirements of Title IV of the LMRDA. The Nominating Committee is comprised of five members: one member is "identified" by the ASC Executive Committee while another member is "identified" by the CBC Executive Committee. Three members are Council members chosen by election from the membership of the Council, which election shall take place in the Council at the Annual Meeting. Among the functions of the Nominating Committee is to seek and receive suggestions from members, chapters, and conferences regarding persons to be nominated. In addition, the Nominating Committee is to meet and submit its report to the Secretary-Treasurer for publication to members at a date determined by the Council.

You believe that the two Nominating Committee members who are not Council members should have been elected by the AAUP membership in order to sit on this committee. The members of the Nominating Committee would have to be elected only if the Nominating Committee performs executive functions or all of its members are identified as constitutional officers. The two members, one selected by the ASC and the other by the CBC, are not constitutional officers. The Nominating Committee as a whole performs no executive functions. The solicitation of nominations is not an executive function. The Nominating Committee selects two candidates for every office, based on submissions made by members, chapters, and conferences. The Nominating Committee does not make a final and binding decision on who will be placed on the ballot. The Nominating Committee is not vested with broad governing or policy-making authority. Consequently, the two Nominating Committee members in questions were not required to be elected. There was no violation.

You alleged that members of the AAUP Grievance Committee perform executive functions, and as such, should have been elected rather than appointed. You contend that the Grievance Committee's authority to investigate and dismiss complaints constitute executive functions. The appointment of Grievance Committee members is set forth in a one-page document of the AAUP Grievance Procedure (Grievance Procedure). The Grievance Procedure provides, in relevant part, that the President appoint three members from the Council to sit on the Grievance Committee. Any AAUP member who believes that a professional staff member has mishandled a matter concerning that member may file a complaint with the General Secretary. If the complaint is not resolved to that member's satisfaction after two internal staff reviews, the Grievance Committee is authorized to conduct such inquiry as it deems warranted. Should the Grievance Committee find the complaint meritorious, it recommends appropriate remedies. The Grievance Committee is to submit its report and recommendation to the Council's Executive Committee, which renders the final decision.

Although the three members of the Grievance Committee are members of the Council, the governing body of the AAUP, they do not perform any executive functions in their capacity as Grievance Committee members. Grievance Committee members are authorized to investigate grievances and determine their merit-worthiness, functions that do not encompass setting AAUP policies. Moreover, Grievance Committee decisions are not binding on the AAUP; the Executive Committee makes the final decision. Grievance Committee members were properly not elected, as that body does not perform executive functions. There was no violation.

You alleged that members of the AAUP Panel on Chapter and Conference Sanctions (Panel) perform executive functions, and as such, should have been elected rather than appointed. You believe that the authority to determine the merits of complaints filed against chapters and conferences, and the authority to impose sanctions constitute executive functions.

The Panel is governed by the Procedures for Review and Resolution of Complaints Against AAUP Chapters and Conferences (Procedures), a governing document of the AAUP, approved by the Council on June 13, 2004. The Procedures allow a member to file a complaint alleging that a chapter or conference has breached standards of conduct. If the complaint cannot be resolved at the chapter or conference level, the Panel is authorized to review the complaint and conduct such inquiry as it deems warranted and may undertake further inquiries regarding the complaint and/or attempt to effect a resolution of the complaint. At the conclusion of its review, the Panel provides written notice to the complainant and the respondent of its determination. Procedures, section D. If the Panel determines that the complaint is without merit, it can dismiss the complaint, and the Panel's decision is final and binding. However, if

the Panel believes the complaint to be meritorious, it may impose any sanction save rescission of conference status or revocation of a chapter charter; such decisions are made by the Council appealable to the Annual Meeting of the Association, whose decision is final and binding. Sections E and F.

The investigation disclosed that the Panel is complaint-driven, in that the Panel responds to specific allegations of misconduct brought by a member against a particular conference or chapter. Consequently, the Panel has limited investigatory authority, tailored to the complaint filed. Although the Panel has the authority to dismiss complaints determined to be without merit, the Panel does not have the authority to impose the sanctions of rescission or revocation. Such decisions are made by elected Council members and are appealable. The Panel has no policy-making authority and does not perform executive functions. Consequently, members of the Panel are not required to be elected. There is no violation.

You alleged that the General Secretary performs executive functions and therefore that position should have been elected under the requirements of Title IV of the LMRDA. You stated that the General Secretary's power to launch investigations of a campus, handle grievances, and be the sole initiator of conference or chapter investigations for sanctions are indicative of the executive nature of that position. By way of example, you stated that the General Secretary, under the Procedures for Review and Resolution of Complaints against AAUP Chapters and Conferences, is permitted to take all steps independently and may determine outcomes rather than implement decisions made by elected officers with respect to the Panel on Chapters and Conference Sanctions.

The General Secretary is not identified as a constitutional officer. Article III, section 1, AAUP Constitution. The Council appoints the General Secretary and determines his or her salary. Gary Rhoades was appointed on January 1, 2009. Although the General Secretary has a voice in the Council and the Executive Committee meetings, he has no vote, and therefore has no authority to set the policies of AAUP. The General Secretary's main duties are to implement AAUP's policies, the Council's priorities, and run the AAUP's national office. Both the Council and Executive Committee have held meetings where the General Secretary was not in attendance. Further, the General Secretary has no role in the AAUP finances. Although he has a voice on the needs of the AAUP, he has no vote on how the organization may spend its money. He is not a signatory on any of the union's accounts. The position of General Secretary is equivalent to that of an executive director in most associations.

The General Secretary is a member of the Investigations Committee, which launches investigations of campuses. All members of the Investigations Committee are appointed by the President, who serves in *ex officio* capacity on that committee. The General Secretary has no decision making role on the Investigations Committee. The

Investigations Committee can only make recommendations and cannot launch an investigation on any campus; such powers are held by the President. Similarly, the General Secretary has no authority to pursue a collective bargaining agreement with any university, and has no authority concerning which schools to organize.

The General Secretary is not a member of the Panel on Chapter and Conference Sanctions (Panel), a body with investigatory functions concerning the conduct of a chapter or conference. As noted above, the members of the Panel are elected by the Council. The standards of conduct for chapters and conferences reserve to the General Secretary the exclusive responsibility to authorize an investigation of alleged violations of fundamental principles, a decision that is made only after a comprehensive preliminary investigation and consultation with the Staff Committee on Investigations. AAUP's Guidelines for Good Practices for Chapters and Conferences, p. 3. With respect to the operations of this Panel, the General Secretary's role is preliminary and mediatory. The General Secretary implements the policies of the AAUP, and therefore that position is not an "officer" within the meaning of section 3(n) of the LMRDA. *See* 29 C.F.R. § 452.20(b). Consequently, the position of General Secretary was not required to be elected under Title IV of the LMRDA. There was no violation.

You alleged that all ASC officers, other than the ASC Chair, were not properly elected. The section 401 election protections apply to those unions that are defined as "labor organizations" under section 3 of the LMRDA. 29 U.S.C. § 402(i). The Department has determined, given ASC's functions and purposes, that the ASC is an administrative branch of the AAUP, and therefore not subject to the requirements of section 401 of the LMRDA. *See* 29 C.F.R. § 452.11. Consequently, all of your allegations concerning the election of officers of ASC, excluding the office of ASC Chair, were not investigated by the Department and are dismissed.

In addition, you raised many allegations related to the election of Collective Bargaining Congress (CBC) and its Chair. The CBC Chair sits on the AAUP Executive Board and is therefore a covered office, subject to the election provisions of section 401 of the LMRDA. AAUP Constitution, Article IV, section 1. However, in order to file a protest concerning the CBC election, the AAUP requires that the person be a member of the CBC or any CBC chapter. The investigation disclosed that you are not a member of the CBC or any of its chapters; rather, you are an at-large member. Consequently, you were ineligible to participate in the election for CBC Chair or to file a protest concerning that election. Because you are not a member of the CBC or any of its chapters, all of your allegations concerning the CBC election are dismissed.

Your complaint also raised a number of issues that were not within the scope of the protest you filed with the union or would not, even if true, constitute violations of the LMRDA. These issues were not investigated by the Department.

For the reasons set forth above, the Department has concluded that those allegations in your September 27, 2009, administrative complaint that were not resolved by the supervised election were not violations that affected the outcome of the election and I have closed the file in this matter.

Sincerely,

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