



April 20, 2016



Dear [REDACTED]:

This is in response to your September 25, 2015 letter requesting a review of the determination dismissing your complaint concerning the election of union officers conducted by District Council 179, American Federation of Government Employees (AFGE), on May 18, 2014. Your complaint was dismissed by Acting Chief of the Division of Enforcement (DOE) Stephen Willertz (the DOE Acting Chief), of the Office of Labor-Management Standards (OLMS), in a Statement of Reasons dated August 25, 2015. You were informed of your right to request review of this determination in a letter dated September 10, 2015. For the reasons that follow, I affirm the determination dismissing your complaint.

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 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. §§ 481(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 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.

The regulations provide for review of the determination dismissing your complaint but only on the basis of deciding whether the decision by the DOE Acting Chief 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 seven exhibits, the Statement of Reasons, and your original complaint. For the reasons identified below, I have determined that the DOE Acting Chief was not arbitrary and capricious when he dismissed your complaint.

You requested that I review DOE's determination dismissing your complaint regarding the election of officers to the 5<sup>th</sup> District VA Council 179. In your letter, you state that the DOE Acting Chief addressed only eight out of 32 violations discussed in your initial complaint. However, many of the allegations in your complaint were of a similar nature and some did not implicate the officer election provisions in any way. My analysis addresses related allegations together where appropriate.

1. Eleven locals' delegates were not properly credentialed and were allowed to cast votes without the proper documentation

The first six allegations (Allegations 1- 6) in your original complaint relate to your contention that eleven AFGE locals were permitted to participate in the nominations and election of District Council 179 officers, even though the District Council 179 Credentialing Committee reported that these locals failed to provide the proper documentation. In your request for review, you stated that eleven locals were ineligible to be seated and that the DOE Acting Chief's letter addressed only nine of the locals, raising the concern whether any violations relating to the other two locals could have affected the outcome of the election.

The result of the investigation, as the DOE Acting Chief informed you in the August 25, 2015 Statement of Reasons, was that OLMS found that, of the nineteen locals participating in the District 179 convention, only nine specific locals' participation violated or may have violated the LMRDA. A careful reading of the Statement of Reasons indicates that the list of nine locals identified by OLMS as problematic was discerned after investigating the eligibility of each of the nineteen locals, not simply the eleven locals that were disapproved by the Credentialing Committee. OLMS found that four locals (515, 1687, 1915, and 2207) failed to properly elect delegates or improperly disqualified candidates as delegates and five other locals (131, 1844, 1985, 2400, and 3930) may have improperly elected their delegates. Comparing these nine locals to the eleven locals that the Credentialing Committee had disapproved reveals that only four of the locals (1687, 1844, 1915, and 2207) identified by OLMS as problematic were also disapproved by the Credentialing Committee. *See* Request for Review, Exhibit 7, Minutes to the 5<sup>th</sup> District VA Council Meeting, May 17-18, 2014 (Attached). Three more locals (131, 2400, and 3930) identified as problematic had been among the six locals deemed approved by the Credentialing Committee. *Id.* The two other locals (515 and 1985) identified as problematic by OLMS were found neither approved nor disapproved by the Credentialing Committee; however, they were treated as ineligible because they had submitted no documentation at all. *Id.*

By comparing the list of locals that the OLMS investigation found problematic to the lists of locals approved or disapproved by the Credentialing Committee, it is readily apparent that the OLMS investigation extended beyond the eleven locals originally disapproved by the Credentialing committee to those locals that had been approved, as well as the remaining two

locals on neither list. Accordingly, OLMS' investigation cannot be seen as failing to investigate the eligibility of two locals as you contend.

As outlined by the Statement of Reasons, the Acting DOE Chief concluded that a total of 4,202 improper votes (2,042 votes cast by ineligible locals and 2,160 votes cast by locals that may have been ineligible) may have been cast in the election, in which the vote margins for the contested races ranged from 6,803 to 8,605 votes. Accordingly, the Acting DOE Chief also concluded that no violation of the LMRDA occurred that may have affected the outcome of the election. You provided no further information or analysis in your request for review as to why this decision was arbitrary and capricious. Therefore, I do not find the Acting DOE Chief's conclusion that there was no violation of the LMRDA that may have affected the outcome of the election to be arbitrary and capricious.

You also alleged that there was no requirement that credentials documents be shown as voters entered the polls and that some voters were asked for identification while others were not (Allegation 9). Section 401(c) of the LMRDA requires that a union provide adequate safeguards to insure a fair election. The union has a wide range of discretion regarding the conduct of an election circumscribed, by a general rule of fairness. 29 C.F.R. § 452.110. From Exhibit 4 of your request for review, it appears that there were approximately 50 voters on hand, some of whom would have been known to the election committee. Further, you provided no evidence showing that persons posing as named delegates were permitted to vote as a result of this practice. Therefore, I do not find the DOE Acting Chief's conclusion that there was no violation of the LMRDA that may have affected the outcome of the election to be arbitrary and capricious.

## 2. The secrecy and security of the ballots were compromised.

Another issue that was reflected by five of the overlapping allegations in your original complaint (Allegations 11, 12, 13, 17 and 18) concerned whether the secrecy of the ballots was compromised during the election. The DOE Acting Chief also addressed these issues in his determination, describing the evidence relating to ballot secrecy that was gathered during the Department's investigation. Such evidence included testimony by multiple persons that was inconsistent with your allegations on ballot secrecy, and the evidence as a whole was, as the DOE Acting Chief stated, inconclusive as to whether ballot secrecy was compromised. Therefore, the DOE Acting Chief concluded that the evidence did not provide an adequate basis for finding probable cause to believe that the LMRDA or the District Council 179 constitution was violated, and I do not find that conclusion to be arbitrary and capricious.

The DOE Acting Chief also addressed your two allegations about the security of the voted ballots. First, you alleged that ballot security was compromised when the ballot box became full and voters had to place their hands into the ballot box and shove down the ballots so that their ballots would fit into the box (Allegation 19). The Statement of Reasons reported that DOE's investigation found that election committee members and observers were in the area throughout the election process and did not witness delegates removing ballots from the ballot box. Hence no violation of the LMRDA occurred.

Second, the DOE Acting Chief also addressed your allegations that the Sergeant-at-Arms had control of the unused ballots during the voting and ballot tallying processes and that there was no accounting of the unused ballots in his possession (Allegation 20). The DOE Acting Chief wrote that the investigation determined that the unused ballots were secured under a table at which election committee members sat during the entire voting process, and that neither these election committee members nor the observers stated that they witnessed the Sergeant-at-Arms access the unused ballots during the voting process. He added that after the voting was completed, the Sergeant-at-Arms, in the presence of the election committee and observers, removed the unused ballots from under the table, and then those ballots were sealed in an envelope, which then was taped to the box containing election records, thus keeping those ballots completely separate from the ones that voters used.

Based on these factual findings, and the lack of any evidence of fraud or impropriety, the DOE Acting Chief concluded that no LMRDA violation occurred that could have affected the outcome of this election. In your request for review you provided no information that would contradict this conclusion. As a result, I do not find the DOE Acting Chief's conclusion to be arbitrary or capricious.

### 3. The ballots did not reflect the numbers on the tally sheets and were miscounted.

The DOE Acting Chief also addressed your five overlapping allegations (Allegations 21, 22, 25, 26, 27) relating to problems that you identified regarding the conduct of the tally. In essence, you alleged that the votes on the tally sheets did not match the results of the vote counts and that the ballots were not recounted. The DOE Acting Chief noted that the Department's investigation confirmed that after the initial vote count, the votes recorded on the tally sheet did not match the results of the vote count. However, he noted that the investigation indicated that the election committee did recount the votes reflected on the ballots twice and recalculated the votes recorded on the tally sheets several times. The election committee's final recount of the ballots found that 12,765 votes were cast for the race of president and 12,760 votes were cast for the secretary/treasurer race. Moreover, the Department also conducted a recount, and found that 12,743 votes were cast for each of the races. The vote margins ranged from 6,803 to 8,605 votes. The DOE Acting Chief wrote that to the extent that the minor discrepancies between the Department's and the election committee's recount of the votes constituted a violation of the LMRDA, any violation did not affect the outcome of the election. Because I did not find any information in your request for review to contradict the DOE Acting Chief's conclusion, I do not find his decision to be arbitrary or capricious.

### 4. Miscellaneous allegations specifically addressed in the Statement of Reasons

You made several other allegations that the DOE Acting Chief addressed. First, you alleged that the former District Council 179 president interfered with the duties of the election committee (Allegation 10), in particular, by attempting to divide up the number of votes for a legally seated delegate. The Statement of Reasons stated that the investigation revealed that no interference actually occurred and that the election committee correctly allotted the voting strength of the local concerned. Again, you did not provide any further information or analysis in your request for review as to why this decision was arbitrary and capricious. Therefore, I do not find the DOE

Acting Chief's conclusion that there was no violation of the LMRDA to be arbitrary and capricious.

Second, you alleged that [REDACTED] name was spelled incorrectly on the ballot (Allegation 16). The Department's investigation found that both candidates' names were incorrectly spelled on the ballot and that the delegates were not confused by the misspelling of the names nor did they fail to vote for either candidate because their names were not correctly spelled on the ballot. The DOE Acting Chief concluded that to the extent that the LMRDA was violated as a result of the misspelled names on the ballot, there was no violation that may have affected the outcome of the election. You did not provide any evidence to contradict the findings or any significant analysis as to why the conclusion was arbitrary and capricious. Thus, I do not find this decision to be arbitrary or capricious.

Third, you alleged that a potential candidate for District Council 179 president was subjected to improper interference by the president of Local 2779 and a member of the council (Allegation 32). As the Acting DOE Chief relayed, the Department's investigation found that, during the District Council 179 caucus, there was a confrontation between Muriel Newman, the president of Local 2779, and [REDACTED] concerning whether Local 2779 should be seated at the caucus. Further he stated that DOE's investigation found no evidence that this confrontation improperly interfered with [REDACTED] right to be a candidate. You provided no evidence in your request for review to challenge that finding, and nothing to contradict the DOE Acting Chief's conclusion based on it. Therefore I do not find the DOE Acting Chief's conclusion to be arbitrary and capricious.

Fourth, you alleged that the District Council 179 constitution was violated when the election was conducted at 1:30 p.m. instead of 1:00 p.m., as the District Council 179 constitution specifies (Allegation 8). However, as stated by the Acting DOE Chief, the Department's investigation showed that 19 AFGE locals attended the District Council 179 convention and that all of the delegates from these locals participated in the nominations and election of District Council 179 officers. Therefore, the DOE Acting Chief concluded, to the extent that the LMRDA was violated because the election started late, the violation would not have affected the outcome of the election. You did not provide an analysis in your request for review to explain why this conclusion was arbitrary and capricious.

5. Allegations of conduct not prohibited by the LMRDA or the union's own constitution and bylaws

As the DOE Acting Chief stated in his letter to you, you made allegations that are not governed by either the union officer election provisions of the LMRDA or the union's own constitution and bylaws, which must also be followed under the LMRDA. Thus, as the DOE Acting Chief stated, even if these allegations were true, the LMRDA was not violated and there are no further actions that may be taken. While the Statement of Reasons did not specifically review those nine allegations that did not implicate any legal requirement, I have reviewed these allegations for the purpose of determining whether the DOE Acting Chief's conclusions were arbitrary and capricious.

Two of the remaining allegations related to the tally (Allegation 23 and 24). You alleged that the unused ballots were not placed inside a secure box with the ballots, rather they were in a separate container and taped across the secure ballot box and that the unused ballots were not counted in presence of the observers. You also alleged that during the process of a recount of the votes, the President of 5<sup>th</sup> District VA Council 179 tore open the box such that a new box had to be obtained. While the LMRDA requires the union to provide adequate safeguards to ensure a fair election, you have not explained how the union failed in this regard or how the unused ballots related to the tally. The Statement of Reasons indicated that the investigation included a complete recount of the ballots. Therefore I find that the DOE Acting Chief's conclusion was not arbitrary and capricious.

Third, you alleged that there was no identification on the Election Committee or the observers to identify them at the polling place (Allegation 7). Because neither the LMRDA nor the District Council 179 bylaws require election observers to wear identification at the polling place, this allegation would not be a violation of the LMRDA even if it were true. You provided no further information or analysis in your request for review as to why this conclusion was arbitrary and capricious. Therefore I find that the DOE Acting Chief's conclusion was not arbitrary and capricious.

Fourth, you allege that a candidate's observer was also a member of the credentialing committee that was still in effect thus alleging that an observer lacked qualifications for that role (Allegation 14). As the DOE Acting Chief stated, the District Council 179 constitution is silent regarding qualifications for observers. Nor does this allegation implicate any of the requirements of the LMRDA. Accordingly, the DOE Acting Chief concluded that neither the LMRDA nor the District Council 179 constitution was violated with respect to this allegation regarding observer qualifications, and therefore no action could be taken based on this allegation. You provided no analysis in your request for review as to why this conclusion was arbitrary and capricious. Therefore I find that the DOE Acting Chief's conclusion was not arbitrary and capricious.

Fifth, you also allege that the Election Committee did not meet with the candidates prior to the election or explain how the candidates' names were to be placed on the ballot (Allegation 15). Again, the LMRDA does not address this issue, and the alleged violation would not be a violation of the LMRDA. You also alleged in a sixth allegation (Allegation 28) that during the announcement of the winners of the election of District Council 179, an individual opened champagne and alcohol was poured into cups and passed around while the meeting was in session. This allegation is also not a violation of the LMRDA. Nor do either of these allegations state a violation of the union's own constitution and bylaws. Accordingly, the DOE Acting Chief's conclusion that these allegations provided no basis for an action was not arbitrary and capricious.

You made three allegations regarding constitutional changes made by meeting attendees that had not been previously sent out to the local presidents or delegates after the appointed constitutional time to adjourn and without a motion to continue (Allegations 29, 30, and 31). In your original complaint you do not specify what these constitutional changes were or how they impacted the election. In your request for review you did not provide any further detail to suggest that any of the above allegations were violations of the LMRDA or of District Council 179's bylaws.

Further, Article XIII, Section 1(b) of District Council 179's bylaws allows for amendments to the local's constitution to be brought upon the floor of a Council meeting, even if they have not been submitted to the Secretary-Treasurer of the Council sixty days prior to the Council meeting. As a result, I do not find the DOE Acting Chief's decision not to address the above mentioned allegations to be arbitrary or capricious.

Last, in your September 25 request for review, you state further that the DOE Acting Chief failed to address "the fact that if Local 515 had not been seated, the president of Local 515 delegates could not have been nominated and elected President of Council 179" and that "one if not two of Local 515 delegates were on the Credentialing Committee." These issues were raised for the first time in your request for review. Accordingly, they are untimely and, moreover, there was no such allegation for DOE to investigate or to address in its Statement of Reasons.

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 the DOE Acting Chief's decision to dismiss your complaint.

Sincerely,



Michael Hayes  
Director