



OLMS Director Decision No. 2017-1

February 2, 2017



Dear [REDACTED]:

This is in response to your July 13, 2016 request for review of the dismissal of your complaint by the Director of the Los Angeles District Office of the Office of Labor-Management Standards (OLMS). Your February 26, 2015 complaint alleged that the American Federation of Government Employees (AFGE) Local 2544 President and Executive Board violated your union member Bill of Rights by removing you from your appointed steward position. You allege that this was in retaliation for successfully bringing charges against the union for failing to hold an election of union officers. You stated that this action violated 29 CFR § 458.2(a)(5)(Safeguards Against Improper Disciplinary Action), § 458.2(a)(2)(Freedom of Speech and Assembly), and § 458.37 (Prohibition of Certain Discipline). You submitted an amended complaint on April 27, 2016 with additional information. The District Director dismissed your complaint and sent you a copy of his determination in a letter on July 5, 2016. Your request for review was made pursuant to 29 CFR § 458.59 and was acknowledged in a letter dated July 20, 2016. For the reasons explained below, I believe that there is a reasonable basis for the 29 CFR § 458.2(a)(2) portion of your complaint, and I am therefore remanding to the OLMS Los Angeles District Office with instructions to refer your complaint to the Chief Administrative Law Judge (ALJ).

OLMS enforces provisions of the Labor-Management Reporting and Disclosure Act of 1959, (LMRDA), 29 U.S.C. §§ 481-484, which promotes union democracy and financial integrity in private sector unions. OLMS also enforces similar provisions for federal sector unions pursuant to the Standards of Conduct provisions of the Civil Reform Act of 1978 (CSRA), 5 U.S.C. § 7120(c), et seq., and its implementing regulations, 29 CFR Part 458, including the union member Bill of Rights. See 29 CFR § 458.2. 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); 29 U.S.C. § 458.1. Accordingly, the CSRA union member Bill of Rights are governed by the standards prescribed in section 101 of the LMRDA, 29 U.S.C. § 411, as well as applicable court precedents under the LMRDA. 29 C.F.R. § 458.1.

The standards of conduct regulations provide that a member may bring a Bill of Rights complaint with OLMS, although the member may be required to exhaust reasonable hearing procedures within his or her labor organization. See 29 C.F.R. § 458.54. Under the Standards of Conduct regulations, a member who alleges a violation of the Bill of Rights provisions is the complainant and, therefore, bears the burden of proving the allegations of the complaint by a preponderance of the evidence in a hearing before an ALJ. 29 CFR § 458.79. The role of the District Director upon receipt of a complaint from a union member alleging a violation of the member's Bill of Rights is to obtain such additional information as she deems necessary and then determine if there is a reasonable basis for the complaint. See 29 C.F.R. §§ 458.57-58. As explained in the OLMS pamphlet [Bill of Rights of Members of Federal Sector Unions: A Complainant's Guide](#):

[t]he purpose for making this determination is to screen out complaints which either (1) are based on matters that are clearly not covered by the bill of rights sections of the regulations, or (2) have no reasonable basis in fact.

Thus, the District Director must determine whether the allegations raise matters that are arguably covered by the bill of rights provisions of the regulations and there is some evidence to support the allegations.

In determining whether there is a reasonable basis for a bill of rights complaint, the District Director in his initial review, and the Director in his subsequent review of the dismissal of a complaint, do not weigh conflicting court decisions to resolve complex legal issues or weigh significant conflicting evidence to resolve disputes or issues of fact. Performing these functions is the role of the administrative law judge in a recommended decision and order.

If the District Director determines that there is a reasonable basis for the complaint, he or she refers the case to the Chief Administrative Law Judge, U.S. Department of Labor, for issuance of a notice of hearing before an ALJ. 29 C.F.R. § 458.60.

Upon receipt of a timely submitted appeal, the Director may review the decision of the District Director to dismiss the complaint. See 29 CFR § 458.59. My review of the District Director's decision to dismiss your Bill of Rights complaint is based on consideration of the reasons for dismissal of your complaint given by the District Director in his July 5, 2016 Dismissal Letter, your July 13, 2016 letter to the OLMS Director requesting review of the dismissal, and the file created by the District Director during the preliminary inquiry of this matter.

## I. Background

From the documents reviewed, the background of this matter appears to be as follows.

You became a Local 2544 steward in December of 2012 and were removed from that position in January of 2015. On December 5, 2013, you called the 12<sup>th</sup> District AFGE office in San Diego, California, inquiring why the local union had not had elections in years and why it had failed to notify the membership of nominations, elections or changes to the bylaws. Subsequently, on December 9, 2013, you filed a formal complaint against Local 2544 with the AFGE 12<sup>th</sup> District

National Vice President George McCubbin. After exhausting the union's election complaint procedure, you referred your case to the Department of Labor. On August 12, 2014, the local union entered into a voluntary settlement agreement with the Department of Labor, and supervised elections were held.

You stated that on December 5, 2013, [REDACTED], Local 2544's 3rd Vice President, and Art Del Cueto, Local 2544's President, came to the [REDACTED] and provided management with copies of emails between [REDACTED], [REDACTED] and executive board members of the union. The emails were sent via the employer's email system and concerned internal union business. [REDACTED] received oral counseling from agency management as a result of his use of the government email system for union business. Local 2544 determined that such use of the government email system also warranted disciplinary action from the union.

After this incident, [REDACTED] filed an unfair labor practice charge against Local 2544 with the Federal Labor Relations Authority. The parties settled the matter in 2014. It appears that, as a part of that settlement, Local 2544 issued a letter on August 11, 2014 to [REDACTED] that was signed by Mr. Del Cueto, indicating that the union recognized that it is an unfair labor practice under section 7116(b) of the CSRA for the union to attempt to discipline an employee for engaging in rights secured under section 7102 of the CSRA. Local 2544 also acknowledged in the letter that [REDACTED]

On January 12, 2015, you received a phone call from the Chief Steward of [REDACTED], [REDACTED], notifying you that the Local 2544 Executive Board had voted to remove you as steward. In your complaint, you state that the Local 2544 President, Art Del Cueto, lied to the other members of the Executive Board to have you removed from your position as a union steward for members of the [REDACTED]. You state that you were never questioned by Mr. Del Cueto or any other Executive Board members regarding any charges against you, and that your removal was part of a pattern of retaliatory behavior against anyone who opposed their point of view and challenged them.

Mr. Del Cueto stated in an interview with OLMS that you were removed because you did not complete the requirements of your job, such as communicating with the local president or attending meetings. [REDACTED]

[REDACTED] Mr. Del Cueto alleged that when [REDACTED], the steward whose shift was ending, requested your assistance on the scene, you replied that it was not your area of responsibility. After this incident, Del Cueto stated that he called for a board vote due to your [REDACTED]

On January 18, 2015, [REDACTED] was removed as a union steward of [REDACTED]. [REDACTED] was the sole candidate running against Mr. Del Cueto for the presidency of the Local. [REDACTED] was informed that he was being removed from his position because he only represented one agent in the local throughout his tenure, which you allege that he disputed.

In April 2015, [REDACTED] resigned as union steward from the [REDACTED] due to what you characterized as "trumped up charges" being filed against him by members of the

Executive Board. Supporting documents that you submitted showed that allegations were filed against [REDACTED] for [REDACTED] as well as posting sensitive information on [REDACTED]. [REDACTED] was given a May 7, 2015 "Letter of Caution" by the Acting Assistant Chief Patrol Agent to be placed in his official employment folder, which stated that he should refrain [REDACTED]. You stated in your complaint that [REDACTED] felt his removal was imminent and feared further retaliation. [REDACTED] had unsuccessfully run for the office of the [REDACTED] in Local's most recent elections and had run against the incumbent.

As proof that your dismissal was part of a retaliatory pattern, you stated that you were never served a written notice of any wrongdoing, nor were you provided a hearing or asked questions about the concerns Mr. Del Cueto brought in front of the executive board. You stated that [REDACTED], and [REDACTED] were effectively removed from positions as union steward, which you submitted as evidence of a retaliatory pattern.

OLMS Los Angeles District Director Edgar Oquendo found no reasonable basis for your complaint in his July 5, 2016 letter. Director Oquendo wrote that your dismissal from your position as steward did not constitute improper disciplinary action for the purposes of section 458.2(a)(5). He also stated that you failed to state a cognizable freedom of speech claim under 458.2(a)(2).

## II. Discussion

Initially, I conclude that the actions taken against you by the union are not the type of discipline covered by 29 CFR § 458.2(a)(5), because removal from appointed union office does not violate the LMRDA. The Supreme Court has stated that the LMRDA protects primarily the rights of rank and file union members, not those of union officers or employees, under Title I of the LMRDA. Your rights and status as a union member were not affected by the actions taken against you.

The removal of your appointed stewardship position did not affect your rights as a member in good standing. The regulations at 29 C.F.R. Section 458.2(a)(5) state that no member of any labor organization may be fined, suspended, expelled, or otherwise disciplined, except for non-payment of dues unless the member has been (i) served with written charges, (ii) given a reasonable time to prepare a defense, and (iii) afforded a full and fair hearing. The phrase "otherwise disciplined" has a narrow meaning. "Discipline," under Section 101(a)(5) of the LMRDA, the provision regarding safeguards against improper disciplinary action, is a retaliatory act that affects a union member's rights or status as member of that union. Murray v. Laborers Union Local No. 324, 55 F.3d 1445, 1454 (9th Cir. 1995).

The union's action affected your status as a union steward, which is an appointed union position, but did not affect your union membership. Courts emphasize that Congress intended the Bill of Rights to protect *union members' rights as members*, not an individual member's right to employment or representative status with the union. Franza v. Int'l Bhd. of Teamsters, Local 671, 869 F.2d 41, 45 (2d Cir. 1989). Although you are no longer a steward, you are still permitted to attend union meetings, participate in union meetings, and required to pay dues. You

are still an active member of AFGE Local 2544 with full membership privileges and voting rights. Your complaint and appeal do not allege that any of your rights as a member were removed. Your union membership rights remain unaffected by your removal as steward, an appointed position.

However, I conclude that you have provided sufficient evidence to establish a “reasonable basis” for a claim under 29 C.F.R. § 458.2(a)(2), which grants union members freedom of speech rights, and 29 C.F.R. § 458.37, which prohibits discipline against any member for exercising free speech rights. The standards of conduct regulations and the LMRDA provide members of labor organizations with certain basic rights, including the rights of freedom of speech and assembly. They state in pertinent part:

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization’s established and reasonable rules pertaining to the conduct of meetings . . . .

29 C.F.R. § 458.2(a); 29 U.S.C. § 411(a)(2).

Additionally, LMRDA section 609, 29 CFR § 458.37, prohibits discipline of a member for exercising rights under the LMRDA, including the freedom of speech. You allege that you were wrongly disciplined when you and ██████████ were removed from positions as union stewards, and that ██████████ and ██████████ were wrongly disciplined as well, leading to their respective resignations as union stewards. You contend that there was evidence of a retaliatory pattern in response to the exercise of your right to free speech. In determining whether there is a reasonable basis for your complaint that your member rights under 29 C.F.R. § 458.2 were violated, we considered whether (1) your dismissal as a union steward, as well as the dismissal of ██████████ and the actions taken against ██████████ and ██████████, may constitute an infringement of your member rights under the law, and (2) whether the facts in this case may indicate that your removal from the Tucson Station union steward position was taken in retaliation for the exercise of your member rights.

The Court has held that LMRDA section 609, prohibiting discipline of a member for exercising rights under the LMRDA, encompasses only retaliatory actions that affect *members’* rights or status as union *members*. Finnegan v. Leu, 456 U.S. 431 (1982). I note that an exception to the Finnegan rule is recognized when, to protect the LMRDA or CSRA rights of union members, an appointed officer can challenge his or her removal as being part of an effort by the union’s leadership to suppress dissent through a “series of oppressive acts” that include removal of political opponents and that “directly threaten the freedom of members to speak out.” See Maddalone v. Local 17, United Bhd. of Carpenters and Joiners of Am., 152 F.3d 178, 184 (2d Cir.1998)(quoting Cotter v. Owens, 753 F.2d 223, 229 (2d Cir.1985)). Therefore, the actions you have alleged may be found to be an infringement of your member rights under the law, if they can be shown to constitute a pattern of retaliatory acts by the union’s leadership.

Thus, the removal as a steward, an appointed position, cannot serve as the basis for a successful Bill of Rights claim unless: 1) it affects the union member's rights as a union member or 2) the removal was part of a pattern to suppress dissent within the union. As stated, your rights and status as a union member were not affected by the actions taken against you. In your appeal, though, you mention your union's removal of appointed union steward [REDACTED] within about a week of your removal, the resignation of union steward [REDACTED] the month after your removal, and union actions regarding steward [REDACTED] several months prior to your removal. [REDACTED] and [REDACTED] have also filed complaints with OLMS. The union claims that in each of these instances there was a non-retaliatory basis for the actions taken. The reasons behind these actions, however, cannot be resolved without factual findings.

I therefore believe that there is a reasonable basis for your complaint, so I am returning this matter to the District Director with instructions to refer your complaint to the Chief Administrative Law Judge, as well as any similar complaints submitted by the other stewards.

Sincerely,

Andrew Auerbach  
Acting OLMS Director

cc: Los Angeles District Director Edgar Oquendo