



OLMS Director Decision No. 2018-2

March 9, 2018



Dear [REDACTED]:

This is in response to your July 11, 2017 request for review of the dismissal of your complaint by the Supervisory Investigator of the Atlanta-Nashville District Office of the Office of Labor-Management Standards (OLMS). Your June 1, 2017 complaint alleged that the American Federation of Government Employees (AFGE) national union and AFGE Local 987 violated your rights as a union member to support the candidate of your choice. You also stated that the AFGE national and Local 987 retaliated against you because of your support of a candidate other than the incumbent Fifth District National Vice President (NVP) in the May 2017 elections.

The Supervisory Investigator of the Atlanta-Nashville District Office dismissed your complaint as untimely, asserting that you did not exhaust internal union remedies pursuant to 29 C.F.R. § 458.54. The Supervisory Investigator sent you a copy of her determination in a letter on June 26, 2017. Your request for review was made pursuant to 29 C.F.R. § 458.59 and was acknowledged in a letter dated August 1, 2017. For the reasons explained below, I affirm the decision of the Supervisory Investigator to dismiss your complaint, as you have failed to exhaust internal union remedies.

OLMS enforces provisions of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), 29 U.S.C. §§ 401 *et seq.*, 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 C.F.R. Part 458, including the union member Bill of Rights. *See* 29 C.F.R. § 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 C.F.R. § 458.1. Accordingly, in applying the standards of the CSRA union member Bill of Rights, OLMS is guided by the interpretations and policies it follows in applying the analogous LMRDA provisions, e.g., section 101 of the LMRDA, 29 U.S.C. § 411, as well as applicable court decisions. 29 C.F.R. § 458.1.

The standards of conduct regulations provide that a member may bring a Bill of Rights complaint with OLMS; however, “such member may be required to exhaust reasonable hearing

procedures (not to exceed a four-month lapse of time)” within his or her labor organization. *See* 29 C.F.R. § 458.54.

The role of the District Director upon receipt of a timely 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 and 58. 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 whether there is some evidence to support the allegations.

If the District Director determines that the complaint is timely and there is a reasonable basis for it, she refers the case to the Chief Administrative Law Judge, U.S. Department of Labor, for issuance of a notice of hearing. 29 C.F.R. § 458.60. If the District Director determines that the complaint is not timely, or matters raised do not arguably implicate the Bill of Rights provisions, then she will send the complainant a letter dismissing the complaint and providing appeal rights. 29 C.F.R. §§ 458.58 and 59. Upon receipt of a timely submitted appeal, the OLMS Director may review the decision of the District Director to dismiss the complaint. *See* 29 C.F.R. § 458.59.

I have reviewed the Supervisory Investigator’s June 26, 2017 Dismissal Letter, your July 11, 2017 letter to the OLMS Director requesting review of the dismissal, and the file created by the Supervisory Investigator during the preliminary inquiry of this matter. It appears that your allegations invoke several provisions of the CSRA Standards of Conduct provisions: 29 C.F.R. § 458.2 (Bill of rights of members of labor organizations), (a)(1) (Equal rights) and (5)(Safeguards against improper disciplinary action), as well as 29 C.F.R. § 458.37 (Prohibition of certain discipline). In your appeal, you also assert violations of 29 C.F.R. § 458.2(a)(2) (Freedom of speech).

Initially, I dismiss all claims made against the AFGE national union as outside of OLMS’ jurisdiction; the national union is a “mixed” union composed of Federal-sector and private-sector members. OLMS’ longstanding policy is to apply the LMRDA, not the CSRA Standards of Conduct provisions, to mixed unions. Thus, Bill of Rights complaints against the AFGE national may be raised only in the U.S. district courts. *See* 29 U.S.C. § 412.

Concerning the complaint against AFGE Local 987, upon review, I affirm the dismissal by the Supervisory Investigator¹, as the available evidence indicates that you failed to exhaust internal AFGE remedies prior to bringing your complaint to OLMS. More specifically, you received the initial charges against you on February 1, 2017, and, on March 3, 2017, you received notice that the union would drop charges if you resigned membership and agreed to not seek office. You declined such offer. In response to the initial charges, the local’s investigation committee preferred charges, and there is no evidence indicating that you appealed such conclusion. Later, you received amended charges against you in May 2017, and the local’s investigation committee

¹The CSRA Standards of Conduct regulations name the District Director of an OLMS district office, not the Supervisory Investigator, as responsible to review a complaint and either dismiss or refer to the ALJ. *See* 29 C.F.R. §§ 458.58 and 458.60. Assuming without concluding this is error, a remand on this point is nevertheless unnecessary because I have independently determined that you failed to exhaust internal union remedies.

sustained each charge after meeting to review them on May 25, 2017. There is no evidence indicating that you appealed the May 25, 2017 committee findings.

In your appeal, you do not deny such a failure to exhaust. Rather, you state initially that the CSRA Standards of Conduct regulations do not require such exhaustion, as they state that a member “may” be required to invoke such remedies. 29 C.F.R. § 458.37. The use of the word “may” does not make exhaustion discretionary. Rather, it recognizes that a union may not have procedures for available for exhaustion. Further, a union may choose to waive its right to require exhaustion, by considering the merits despite a complainant’s failure to exhaust.

In addition, as explained in the June 26, 2017 Dismissal Letter, if a member does not invoke a union’s internal remedies, court decisions require a member to demonstrate a good reason for not first complaining to the union. In this regard, you assert that such an effort would be futile, citing your complaint and the documents supporting your appeal. As noted above, when OLMS applies the CSRA Bill of Rights exhaustion requirement, it must follow the case law interpreting Title I’s exhaustion requirement. In determining whether to excuse a union member’s requirement to exhaust internal union procedures before filing a court action under Section 101 of the LMRDA, courts apply a three-factor test developed by the Supreme Court in *Clayton v. Int’l Union of Auto., Aerospace & Agric. Implement Workers*, 451 U.S. 679, 689 (1981); the factors are as follows:

1. whether union officials are so hostile to the member that he could not hope to obtain a fair hearing on his claim;
2. whether the internal union appeals procedures would be inadequate either to reactivate the member’s grievance or to award him the full relief he seeks; and
3. whether exhaustion of internal procedures would unreasonably delay the employee’s opportunity to obtain a judicial hearing on the merits of his claim.

See Clayton, 451 U.S. at 689. The *Clayton* court held that if any one of these factors is found to exist, a member’s failure to exhaust may be excused. *Id.* Upon review, your supporting documentation does not demonstrate that any of these factors exist.

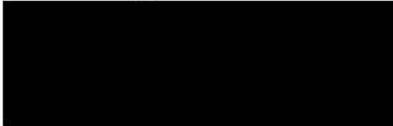
Regarding the first factor, whether union officials are so hostile that you could not hope to obtain a fair hearing, you argue that the local, in conjunction with the AFGE National Vice President (NVP) of the 5th District, has retaliated against you for not supporting the reelection of the NVP. However, this is not persuasive because under AFGE Constitution, Article XXIII (Offenses, Trials, Penalties, Appeals), your appeal of the local union level decision would go to the National Executive Council (NEC). Further, the NVP of the 5th District is only one of fifteen members of the NEC. *See AFGE Constitution*, Article V (Governing Body), Section 3. Even assuming such hostility on the part of the NVP, you have not provided evidence that the remaining fourteen members are so hostile to your claim that you could not hope to obtain a fair hearing.

As for the second and third factors, you have not offered any evidence that AFGE’s internal procedures would be inadequate to address your grievance or unreasonably delay your opportunity to obtain a judicial hearing on the merits of his claim. Indeed, in the appeal process, “The NEC shall review the case and affirm or reverse the decision, reduce the penalty, or return

the case to the local for a new trial before a different trial committee.” *See* AFGE Constitution, Article XXIII (Offenses, Trials, Penalties, Appeals), Sec. 9. Further, “The NEC shall consider the appeal at its next regularly scheduled meeting or at a special meeting called for that purpose by the National President or two-thirds of the NEC.” *Id.* Moreover, an appellant can also appeal any adverse decision of the NEC to the next AFGE National Convention. *Id.*

As a result, I affirm the decision of the OLMS Supervisory Investigator to dismiss your complaint for failing to first exhaust internal AFGE remedies.

Sincerely,



Andrew Auerbach
Acting Director

cc: Atlanta-Nashville District Director Craig Neel
Atlanta-Nashville Supervisory Investigator Takiia Anderson
AFGE Local 987