

July 3, 2012

OLMS Director Decision No. 2012 - 1

[REDACTED]

Dear [REDACTED]:

This is in response to your correspondence dated October 31, 2011, requesting a review of Office of Labor-Management Standards (OLMS) District Director Takia Anderson's October 17, 2011 letter dismissing your complaint to the Department of Labor (Department). That complaint challenged the handling of election protests concerning the election of officers conducted by Local 1909 of the American Federation of Government Employees (AFGE) on April 8, 2011. For the reasons that follow, I am denying your appeal.

The U.S. Department of Labor enforces provisions of the Labor-Management Reporting and Disclosure Act of 1959, (LMRDA), 29 U.S.C. §§ 481-484, including those which govern union officer elections. 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 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 election of officers of federal sector unions is governed by the standards prescribed in sections 401(a)-(g) of the LMRDA to the extent that such standards are relevant to elections held pursuant to the provisions of 5 U.S.C. § 7120. 29 C.F.R. § 458.29.

To bring an election complaint to the Department pursuant to the CSRA, the member must first seek redress from the union, by exhausting internal union remedies. See 29 C.F.R. § 452.135 (the union member must have exhausted internal union remedies available under the union constitution and bylaws before filing a complaint with the Department of Labor). Further, under section 458.64(a) of the regulations, no investigation shall be conducted if it is determined after preliminary inquiry that the complaint is deficient for any of several enumerated reasons including failure to exhaust remedies available under the constitution and bylaws of the labor organization and any parent body.

The regulations implementing the CSRA standards of conduct provisions provide for review of the dismissal of your complaint to determine whether the decision "was arbitrary and capricious." 29 CFR § 458.64(c). This review is conducted by the Director of OLMS, who has been delegated this function, which was previously performed by the Assistant Secretary for Labor Management Standards.¹ This review standard follows the decision of the U. S. Supreme

¹ As of November 8, 2009, the Department of Labor's Employment Standards Administration (ESA) was dissolved into its four constituent components and consequently the position of Assistant Secretary no longer exists. The Secretary of Labor ordered the delegation of Section 701 of the Civil Service Reform Act, specifically including 5

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 the standard of review set out in section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which provides that the decision may only be overturned if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* at 566. Thus, in accordance with the principles in *Bachowski*, my review of the district director’s decision to dismiss your election complaint is limited to consideration of the reasons for dismissal of your complaint given by the district director in her October 17, 2011 Dismissal Letter, your October 31, 2011 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.

As stated, the CSRA provides that before a member may file an election complaint with the Secretary of Labor, he or she must first exhaust the remedies available under the constitution and bylaws of the labor organization and of any parent body, or must pursue such remedies for three calendar months without obtaining a final decision. 29 C.F.R. § 458.63.

The Department’s preliminary inquiry established that the election committee received election protests from you, [REDACTED] and [REDACTED] each of which was filed within 10 days of the election.² The district director concluded that your protest was received by the election committee on April 10, 2011, and the other two protests were post marked April 18, 2011 and received on April 19, 2011. The record indicates that by two letters both dated April 22, 2011, the election committee responded to the protest of [REDACTED] and [REDACTED]. The letter to [REDACTED] is unsigned, but appears above your name and your title as Election Committee Chair. The letter concludes “I believe we should call for a revote.” The letter to [REDACTED] is similar: It is unsigned, contains your name and title, and concludes: “I believe we should call for a revote.” Another letter dated April 29, 2011, appears in the record. It is blank where the name of the addressee would appear, but it restates almost verbatim allegations in your protest. The letter begins by saying “we agree with the official protests of the election for several important infractions and recommend a revote be held.” It concludes by reiterating: “We believe we must have a revote for this election.” It is signed by you, [REDACTED] and [REDACTED].

On May 3, you sent a copy of the protests and the committee’s responses to the protests to the union local 5th District National Representative (NR) [REDACTED] and [REDACTED] of the Office of General Counsel. See June 16, 2011 correspondence from [REDACTED] ams to [REDACTED]

U.S.C. 7120, to the authority of the Director of the Office of Labor-Management Standards. See Secretary’s Order 8-2009; 74 Fed. Reg. 58835 (Nov. 13, 2009).

² While you were a member of the election committee, the record indicates that AFGE does not prohibit members of an election committee to file written protests. The Election Manual clarifies:

A note of caution. Under AFGE policy, there exists no right to be on an election committee. Committees must be neutral, and eligibility to serve on a committee is limited to members having agreed to maintain neutrality by refraining from nominating, supporting, and endorsing candidates. Committee members who wish to express views on candidates should refrain, or withdraw from the committee to preserve strict neutrality...

See *AFGE Election Manual*, Step 1 – Selection of the Local’s Election Committee, p7.

██████████. The election committee apparently did not serve the April 29 letter on all of the affected candidates.

On May 22, 2011, you sent correspondence to Everett Kelley, National Vice President, AFGE 5th District. The correspondence notes that the election is “under protest” and “requests . . . assistance in a remedy.” The correspondence sets forth multiple allegations from your April 10 complaint. By letter dated June 1, 2011, NVP Kelley responded to your letter and found that the election committee failed to “properly exercise its authority” because the election committee did not “render a proper decision” or provide “proper notice” to affected candidates. Thus, he concluded that he would “deny these complaints as they are not properly before” his office.

On June 16, 2011, you wrote to ██████████ in the Office of General Counsel, by letter signed by both you and ██████████. Under your signature line, you identified yourselves as “Election Committee Local 1909 AFGE.” The letter stated that the “Election Committee of Local 1909 is protesting the ruling of NVP Kelly.” It reiterated allegations with regard to the conduct of the election, and the failure of the local union to “accept the “Election Committee’s recommendation” to rerun the election. The letter concludes by requesting review of Kelley’s June 1 decision.

You filed your complaint with the Department by letter dated August 7, 2011, which was received in the Atlanta District Office on August 9, 2011. In the complaint, you and election committee member Carl Smith noted the committee received three election protests: one received on April 10 and the other two on April 18. The complaint outlines the allegations first detailed in your protest to the election committee, and “ask[s] for [the Department’s] assistance in a reelection of the Union Officers.”

In dismissing your complaint, the district director found that you had not properly exhausted your internal union remedies, as is required by 29 C.F.R. 458.63. More specifically, she found that the election committee did not issue a decision with 15 days of receipt of your complaint on April 10, 2011 (the response was due on April 25, 2011 but was not issued until April 29, 2011), and that your May 22, 2011 letter to NVP Kelly “was untimely since it exceeded the 15 days for appeal” from the due date of the election committee’s decision, per Appendix A, Part III, Section 3 of the AFGE Constitution.”

In your request for review, you challenged both aspects of the district director’s determination: that the election committee did not issue a timely decision and that, even if the decision was timely, you did not timely appeal the decision. Regarding the first aspect, you disagreed with the April 10 date for receipt of your protest and instead alleged that the protest was postmarked and thus received on April 15, 2011. You also challenged the AFGE election rules pertaining to when an election protest is received and whether the election committee was required to respond separately to each protest. Second, regarding the timeliness of your appeal to the NVP, you stated that the NVP had died in March 2011, and there was not an election to replace her, to your knowledge, until mid-May. You also stated that you notified 5th District National Representative (NR) ██████████ of your recommendation for a re-run election and requested help, which was ignored.

I conclude that the district director was not arbitrary and capricious in determining that the election committee received your protest on April 10, 2011. In response, you state that you mailed your protest and that the envelope was postmarked April 15. You note that *AFGE's Election Manual* provides that "If mailed, the date of the postmark determines the date of the filing." You conclude, therefore, that your complaint was filed April 15.

I disagree that the district director was arbitrary and capricious in concluding that your protest was filed April 10. The procedures for protesting and appealing the elections of affiliates are set forth in Appendix A, Part III, Sections 2-5 of the *AFGE National Constitution*, readopted in August 2009:

Section 2 provides, *inter alia*, that . . .

election protests must be made to the election committee within 10 days of the election and the election committee shall render a decision within 15 days after receipt of the complaint.

The Election Manual provides in pertinent part:

A complainant must file the protest in writing (not by email) and address it to the chair of the election committee. If mailed, the date of the postmark determines the date of the filing. Otherwise, the committee must receive the protest on or before the deadline.

See *AFGE Election Manual*, Step 25 - Meet to Consider Election Protests, Issue a Decision on Each Protest, and Seal the Election Records, p26 (emphasis removed).

These authorities do not support your claim of an April 15 filing. Under Section 2 of the *AFGE National Constitution*, a protest must be "made" within 10 days of the election. Its "receipt" triggers a 15 period in which the committee must render a decision. The *Election Manual* notes an exception to the receipt rule, stating that a mailed protest is filed on the date of the postmark. Since you served as both the complainant and the election committee chair, it was not unreasonable for the district director to conclude that the date on the letter serves as the received date, regardless of whether or not the letter was also mailed to the election committee. As the chair of the election committee had possession of the protest as of April 10, the protest was therefore filed no later than that date. Events such as the mailing and postmarking of the protest occurring *after* filing do not trigger a fresh 15-day review period. Indeed, in your August 7, 2011 appeal to the district director, you stated that the protest was "received on April 10," as did the AFGE National in its October 6, 2011 letter to the Department's Washington District Office.

Having determined that your protest was filed on April 10, it is necessary to consider whether you exhausted subsequent available remedies. The "election committee must issue a decision within 15 days after receipt of an election protest." See *AFGE Election Manual*, Step 25, p.26.

In the case at hand, the election committee issued a response on April 29, 2011, four days late.³ There was therefore no timely decision on your April 10 protest.

Appendix A, Part III, Section 3 the *AFGE National Constitution* sets forth the procedure to follow when an Election Committee fails to file a timely response.

After a decision by the Election Committee or in the absence of such a decision, the complainant may elevate the complaint by appeal within 15 days of the due date of the Election Committee's decision....

The due date of the decision on your protest was April 25 (15 days following your April 10 submission). Thus, the last date for elevating a complaint was May 10, 2011 (15 days after the April 25 determination deadline). You took no action to advance your protest, however, until May 22, 2011, when you wrote to NVP Kelley.⁴ The district director did not, therefore, act arbitrarily or capriciously when finding that you failed to exhaust your available internal union remedies.⁵

In your appeal, you take issue with the rule that the election committee must decide a protest within 15 days of receipt. You argue that it is impossible to meet this deadline because a protest may be received "the day before the 15 days" expires, leaving insufficient time to render a decision. The argument misreads the rule. "[E]lection protests must be made to the election committee within 10 days of the election and the election committee shall render a decision within 15 days after receipt of the complaint." *AFGE National Constitution*, Appendix A, Part III, Sections 3. First, therefore, the last filed election protest cannot occur more than 10 days after the election, eliminating concerns about a 14 day submission. Second, the decision is due 15 days after "the complaint," not the first-filed complaint. Third, the election committee has authority to extend the 15 day period. *AFGE National Constitution*, Appendix A, Part III, Section 2, p.36.

A final question concerns the status of the April 29, 2011 letter. If the April 29, letter from the Election Committee was a properly made decision in your favor, you would have had no reason to file a protest within 15 days. The April 29 letter, however, was not such a decision. It did not order a new election. Rather, it "recommend[ed] a revote be held." Such language is precatory.

³ After resolving a protest, "the election committee must serve "its written decision timely ... to all affected candidates..." See *AFGE Election Manual*, Step 5, p27. The committee's April 29 letter was apparently not served on all of the affected candidates. See June 16, 2011 correspondence from ██████ to ██████.

⁴ Even assuming that there was a vacancy for the NVP, as you state in your complaint, you did not send your appeal to AFGE 5th District NR Harding or any other 5th District or national representative.

⁵ Additionally, regarding the April 18, 2011 protests cited in your August 7, 2011 appeal to the district director, these protests were not filed by you. They were filed by ██████ and ██████. The protests are therefore not relevant to a determination whether you satisfactorily exhausted your union remedies. In addition, although the file created by the district director indicates that the election committee replied to these protests by ██████ and ██████ on April 22 and 29, 2011, respectively, it did not render a decision on the protests but rather only offered a recommendation for a new election and advised the complainants to forward their protests to the 5th District and to the AFGE National, pursuant to the AFGE internal appeals process. As further support for the conclusion that these letters do not constitute decisions, you were the only signatory to the recommendation, while the AFGE election rules require a majority vote. See *AFGE Election Manual* (10-10-2006) p26. As a result, it was reasonable to conclude that the other two purported decisions were not properly before the District Director.

It conveys a request, not an imperative. Words of hortation do not bind. They constitute an opinion about what should be done about a situation. Consequently, an individual who seeks a new election and receives a recommendation has not prevailed. Consistent with the union's refusal to consider the April 29 letter to be a proper decision, your subsequent letters recognize this, relying largely on the merits of your underlying protests, rather than any authority of the Election Committee's resolution.

Under the standards of review established in *Bachowski*, and for the reasons discussed above, I find that the conclusion of the Atlanta District Director was not arbitrary or capricious, and affirm the decision to dismiss your complaint.

Sincerely,

John Lund, Ph.D.
Director

cc: President, AFGE Local 1909
Chief, OLMS Division of Enforcement
OLMS Atlanta District Office