U.S. Department of Labor

Office of Labor-Management Standards
Division of Enforcement
Washington, DC 20210
(202) 693-0143 Fax: (202) 693-1343

October 13, 2010

[redacted]

Dear [redacted]:

This Statement of Reasons is in response to your complaint filed on February 26, 2010, with the Department of Labor alleging that a violation of Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 481-484, occurred in connection with the election of officers conducted by Make-Up Artists and Hair Stylists Guild, Local 706, International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories And Canada, AFL-CIO, CLC (IATSE), on November 5, 2009.

The Department conducted an investigation of your allegations. As a result of our investigation, the Department has concluded, with respect to your allegations, that there was no violation that may have affected the outcome of the election.

You alleged that [redacted] was ineligible to run for executive board member because he was not working at the trade and held other union offices of assistant business representative and negotiation committee member. You also alleged that incumbent president Susan Cabral-Ebert was ineligible to run for office because she held the offices of president and assistant business representative.

Article Five, Section 1, of the local's constitution provides that to run for office one must be actively engaged in the industry within the local's jurisdiction and have worked for at least 120 days in the past 36 months. That section further provides that time served as an officer of the local shall be applicable towards the 120 days requirement. With respect to your allegation that [redacted] was not working at the trade, the investigation established that the local interprets working as an assistant business representative to be actively engaged in the industry within the local's jurisdiction. The interpretation consistently placed on a union's constitution by the responsible union official or governing body will be accepted unless the interpretation is clearly unreasonable. *See* 29 C.F.R. § 452.3. The Department has determined that this interpretation is not clearly unreasonable. Thus, [redacted] met the working at the trade requirement by serving as an assistant business representative and was, therefore, eligible to run for office.

Article Five, Section 1(h), of the local's constitution provides that no member shall be permitted to seek election to more than one office. Inasmuch as Article Three, Section 1(a), of the local's constitution, which lists the officers of the local, does not include assistant business representatives or negotiation committee members as officers, [redacted] and Cabral-Ebert were eligible to run for their respective office. There was no violation.

You alleged that the nomination and election notice did not inform the members that they, as well as the candidates, could make campaign mailings. The LMRDA does not require unions to include in the election notice any statement with respect to distribution of campaign literature. Moreover, contrary to your allegation, Article Five, Section 2(c) of the local's constitution which provides that the local must comply with the reasonable requests of any *candidate* or *member* to distribute campaign literature at the candidate's own expense was included in the August 2009 issue of the local's newsletter, "706 Bulletin Board," that was mailed to members. There was no violation.

You alleged that the local refused your request for distribution of your campaign statement via email and delayed providing you an opportunity for email distribution of your statement until too late in the election process. The investigation established that you did not make your initial inquiry to have campaign literature distributed by the union until September 29, 2009, the day after the ballots were mailed. The union responded to your request on October 2, 2009, and informed you that it was investigating how to process your request. On October 5, 2009, the union sent an email to you and the candidates for the two contested offices of president and business representative advising all candidates that the union would accept email requests. The investigation did not reveal any evidence that the local unduly delayed in responding to your request. To the contrary, the investigation revealed that the local made reasonable efforts to accommodate your request. You, however, chose not to pursue an email distribution of any campaign literature after you were told that the campaign statement would cost $156.00. There was no violation.

You alleged that the local restricted the content of union emailed campaign literature, and limited the campaign statement to one page. With regard to your allegation that the local restricted the contents of union mailed campaign literature, the investigation did not reveal any evidence to substantiate this allegation. The LMRDA does not and unions may not regulate the contents of campaign literature which candidates may wish to have distributed by the union. *See* 29 C.F.R. § 452.70. The investigation revealed that candidates were informed that the subject line of the email was to state, "Local 706 Election Candidate Statement from _____" and the disclaimer above the candidate's email was to state, "The following is being forwarded as required by the Labor-Management Reporting and Disclosure Act of 1959. The following statement does in no way reflect the views of Local 706 for or against any participating candidate." The local's requirement that each candidate use this particular subject line

and disclaimer does not restrict the content of the candidate's literature. It merely serves to provide notice to the email recipients that the statement is being forwarded as required by the LMRDA. Moreover, the Department determined that the disclaimer requirement was reasonable and appropriate for the local to use to avoid the appearance of promoting one candidate over another. The union's one page limitation is prohibited by 29 C.F.R. § 452.70. However, no request to distribute more than one page was made and refused. Moreover, the union treated candidates equally with respect to the page limitation. There was no violation affecting the outcome of the election.

You alleged that the incumbent president and business representative used union funds to promote their candidacies in two of the local's publications: the monthly news bulletin, "706 Bulletin Board" and the quarterly magazine, "Artisan." The provisions of section 401(g) of the LMRDA prohibit any showing of preference by a union or its officers which is advanced through the use of union funds to criticize or praise any candidate. Thus, a union may neither attack a candidate nor urge the election of a candidate in union-financed communications to the members. Any such expenditure regardless of the amount constitutes a violation of section 401(g). *See* 29 C.F.R. § 452.75.

A use of union funds violates section 401(g) when, taken in context, the overall tone, timing and content of the publication tend to endorse or encourage support for any particular candidate. The Department examined the tone, timing and content of several articles in the local's publications to determine whether these articles constituted promotion of a candidate in violation of section 401(g) of the LMRDA. First, President Cabral-Ebert's column, "The President's Corner" and Business Representative Tommy Cole's column that were published in the monthly editions of the "706 Bulletin Board" were reviewed for the months of July, August, September, October and November 2009. While these columns appeared in the months leading up to the November 2009 election, the Department's review of both of these columns did not reveal any promotion or denigration of any candidate. The articles reported the officers' activities and set forth their views on issues of interest to the membership. Thus, the overall tone, timing and content of these articles did not rise to the level of campaigning in violation of 401(g) of the LMRDA.

Second, President Cabral-Ebert's column, "From The President" and Business Representative Tommy Cole's column, "Local Business" that were published in the winter, spring and summer editions of the 2009 Artisan magazine were examined. The Department found that the content of the columns for these months did not promote or denigrate any candidate. The articles by the president and business representative focused more on their union activities. There were references to their respective positions as officers, but the tone of these articles did not cross the fine line between reporting newsworthy activities of both of these incumbents and campaign promotional

material. None of the articles in these editions of the "Artisan" had the requisite timing, tone and content to establish an actionable violation of the LMRDA.

You alleged that the incumbents and employees of the union should not have been involved in the election process, and that the election should have been run by an independent election committee. Article Five, Sections 2(f) and 2(g), of the local's constitution provide that all voted ballots be returned to a certified accounting firm for the tally. The investigation established that the local retained a certified public accounting firm to receive and tally the ballots. The investigation revealed that a representative of the firm was present when the initial ballots were mailed and that a firm representative accompanied the local union employee to the post office to mail the ballots. Also, the investigation revealed that the unopposed secretary treasurer signed the election notice that accompanied the ballot and that the president signed the nomination notice. The actions of these officers do not constitute Title IV violations. You did not allege specific violations attributable to the incumbents' involvement in the election process. There was no violation.

You alleged that you were not notified of an opportunity to inspect the ballot proof. You further contend that had you inspected the ballot proof, your name would have been listed on the ballot as "[redacted]" and not "[redacted]" The investigation revealed that on September 18, 2009, nominees were advised by email of an opportunity to inspect ballots, that ballots would be printed on September 22, 2009, and that observers were permitted during this phase of the election process. The investigation also revealed that you are the only [redacted] in the local. There was no evidence of voter confusion because your name was listed on the ballot without your middle initial. You further alleged that you would have objected to the word "incumbent" on the ballot. The investigation revealed that it is the local's past practice of designating the incumbents in this manner. The use of "incumbent" on the ballot does not show any bias for or against any candidate. It merely designates those candidates who are again seeking the same office. The Department does not view the use of "incumbent" on the ballot as the use of union funds to promote the candidacy of any person. *See* 29 C.F.R. § 452.73. There was no violation.

You alleged that the secretary-treasurer failed to adhere to Article 5, Section 1(f), of the local constitution when she failed to announce the names of the candidates nominated by mail at the August 16, 2009 nomination meeting. Article 5, Section 1(f), states that the secretary-treasurer must announce the names of all candidates nominated by mail at the August quarterly general membership meeting. The investigation established that the secretary-treasurer failed to announce the names in accordance with the requirements of Article 5, Section 1(f), of the local's constitution. To remedy her failure to follow the constitutional provision, the local, on the day after the nomination meeting, mailed a notice to members advising them of those nominated by mail and extended the deadline for mail-in nominations. The original August 10, 2009 mail-in

nomination deadline was extended to September 8, 2009. While the August 10th deadline date is prescribed in Article 5, Section 1(e), of the constitution, the LMRDA was not violated when the deadline was extended to accommodate more nominations.

You alleged that ballots mailed to members after the initial ballot mailing gave those members less time to return their voted ballots. Section 401(e) of the LMRDA provides an election notice shall be mailed to each member at his last known home address not less than 15 days prior to the election. *See* 29 C.F.R. § 452.99. Therefore, where as here, the election is conducted by mail and no separate notice is mailed to the members, the ballots serve as notice and must be mailed to the members no later than fifteen days prior to the date when they must be mailed back in order to be counted. The ballots were mailed to members in good standing on September 28, 2009, and had to be returned by 5:00 p.m. on November 4, 2009 which more than meets the fifteen day requirement. The investigation further revealed that 119 members who were delinquent in their dues were never mailed the ballot package which included the election notice. The investigation also revealed that the local failed to mail an election notice to 13 members at their last known home address 15 days before the ballot return date. The local's failure to mail a timely election notice to these 132 members constitutes a violation of 401(e) of the LMRDA. This violation, however, did not affect the outcome of the election because the smallest vote margin was 262 votes for the office of president.

You alleged that incumbent president Cabral-Ebert engaged in more than incidental on-duty campaigning against you and more than incidental use of the local's telephone for that purpose. Section 401(g) of the LMRDA prohibits the use of union funds to promote the candidacy of any person in an election subject to the provisions of Title IV. However, union officers and employees retain their rights as members to participate in the affairs of the union, including campaigning activities on behalf of either faction in an election. 29 C.F.R. § 452.76. However, such campaigning must not involve the expenditure of funds in violation of section 401(g). Thus, officers and employees may not campaign on time that is paid for by the union, nor use union funds, facilities, equipment, stationery, etc., to assist them in such campaigning. Campaigning incidental to regular union business would not be a violation. *See* 29 C.F.R. § 452.76.

You contend that one incident of improper campaigning by Cabral-Ebert occurred at a membership meeting after the November 2009 election when you were given an opportunity to address your election protests. Inasmuch as this meeting occurred after the November 2009 election, any comments made by Cabral-Ebert would not constitute campaigning. *See* 29 C.F.R. § 452.76. You also contend that Cabral-Ebert spoke negatively about you to executive board member Dorinda Carey. When Carey was interviewed, she cited one episode that occurred after the November 2006 election which you also protested. The date of occurrence of this episode cannot be considered campaigning for the November 2009 election. Also, the investigation revealed that Carey stated that Cabral-Ebert told her at the end of an August 2009 executive board

meeting that she had the "word out" on you not being dispatched for job assignments. Even if this statement were made by Cabral-Ebert, it would be considered incidental to union business, and not campaigning. In addition, Carey stated that she could not remember exact dates and times of phone calls during which Cabral-Ebert spoke negatively about you. Carey further stated that Cabral-Ebert may have called other executive board members and made similar remarks, but she was not sure of this. Even if Cabral-Ebert improperly campaigned to the 41 members of the executive board, it would not have affected the outcome of the race for the position that you sought because you lost the race for the office of assistant business representative by a margin of 382 votes.

For the reasons set forth above, the Department has concluded that there was no violation of Title IV of the LMRDA that may have affected the outcome of the election, and I have closed the file regarding these allegations.

Sincerely,

Patricia Fox
Chief, Division of Enforcement

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