U.S. Department of Labor

Office of Labor-Management Standards
Division of Enforcement
Washington, DC 20210
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June 23, 2011

[redacted]

This Statement of Reasons is in response to your complaint filed with the Department of Labor on January 10, 2011. In the complaint, you alleged that Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 481-484, was violated in connection with the election of union officers conducted on August 25, 2010, by the International Union of Operating Engineers, Local 132.

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

You alleged that the International improperly applied its candidate qualification requirement of continuous employment "at the trade" when it permitted William Lemley to run for president, because Lemley had worked as a "boss."

The International Union's Constitution, at Article 24 (1)(b), provides: "No member shall be eligible for election, be elected nor hold office who has not during the year . . . immediately prior to the month of nominations, been continuously employed at the trade, or who has not actively sought continuous employment at the trade." Section 401(e) of the LMRDA requires that a union conduct its elections in accordance with its own constitution and bylaws. 29 U.S.C. § 481(e). A union's interpretation of its own governing documents is entitled to deference so long as it is "fair and reasonable." *Reich v. Int'l Alliance of Theatrical Stage Emps. & Moving Picture Mach.Operators*, 32 F.3d 512, 515 (11th Cir. 1994).

Election Chairman [redacted] of Local 132 consulted the General Counsel of the International on the application of the working at the trade requirement when you

raised questions regarding Lemley's eligibility. At the time of the inquiry, the General Counsel agreed with Local 132's determination that Lemley was working at the trade because Lemley's position was not considered a permanent supervisory position, he was working under the collective bargaining agreement (CBA), and the company was contributing on Lemley's behalf to the union pension fund. The General Executive Board of the International later denied your election appeal in its entirety, thereby affirming Local 132's determination that Lemley qualified as working at the trade.

The investigation disclosed that the International considers at least four factors to determine whether a candidate meets the working at the trade requirement: (1) Whether the candidate is covered by the CBA, rather than salaried; (2) Whether the candidate has contributions made into the union's fringe benefit funds by the Employer; (3) Whether the candidate is primarily engaged in operating equipment, rather than exercising managerial or supervisory authority; and (4) If the candidate is not currently engaged in work at the trade, whether there are indications that the candidate is seeking work at the trade.

The investigation further revealed that the International's affirmation of Local 132's determination was fair and reasonable. Local 132 provided documentation showing that Lemley's employer made fringe benefit contributions on his behalf. Local 132 also provided documentation that Lemley was a dues-paying member of the bargaining unit. The first two factors therefore weighed strongly in favor of finding that Lemley was working at the trade. Lemley performed some supervisory functions, but these functions were within the scope of bargaining unit activity governed by the Operating Engineers' pipeline agreement. The third factor therefore weighed somewhat against finding that Lemley was working at the trade, but not strongly. The fourth factor—whether the candidate sought work at the trade—is not relevant to Lemley's situation because Lemley was either working or paid waiting time to return to the same work. On balance, the determination that Lemley was working at the trade was therefore reasonable. There was no violation.

You alleged that the election was compromised because of a personal relationship between [redacted] and Tommy Plymale. [redacted] was the Certified Public Accountant whose firm, [redacted], assisted with the election. Tommy Plymale was the winning candidate for Business Manager.

Section 401(c) of the LMRDA contains a general mandate that adequate safeguards to ensure a fair election shall be provided. Included among those safeguards is a general rule of fairness, which encompasses the requirement that candidates be treated equally. 29 C.F.R. § 452.110. This general rule of fairness does not, however, prohibit a union

from hiring an outside balloting company to oversee its officer election. Nor does the LMRDA prohibit a union from hiring the accounting firm that audits its finances to also oversee balloting for its officer election. You did not identify any specific instances of partisan or biased actions by [redacted] or any employees of his firm; nor did the investigation reveal any. There was no violation.

You alleged that the election was compromised because Local 132's Dispatcher, [redacted], may have used a mail box key from a prior election to remove ballots from the P.O. box for election returns prior to the tally.

The investigation disclosed no evidence of the alleged tampering. It is the policy of the United States Postal Service (USPS) to change the locks on a P.O. box when a box is closed and to issue two new keys when a P.O. box is rented. Prior to the election, Election Chairman [redacted] rented two new P.O. boxes and received two keys for each box. [redacted] kept one key for each box and gave the other set to accountant [redacted] could not have used the old key hanging in the union office to open the P.O. box given the USPS policy of changing the locks after every rental, even if that key had previously opened the same P.O. box. There was no violation.

You alleged that Tommy Plymale used the Local 132 business phone to campaign. You learned about the alleged campaigning on September 27, 2010, but you did not raise the issue in your appeal to the International Union on October 6, 2010. Because you failed to exhaust your remedies with the union, the Department cannot consider this allegation.

Finally, you alleged that a campaign letter sent by retiring Business Manager [redacted] to the membership of Local 132 was misleading and inaccurate. Even if your allegations were true, [redacted]'s actions would not constitute a violation of the LMRDA because unions have no role in approving the content of campaign materials under the LMRDA. Section 401(c) requires unions to honor all reasonable requests of bona fide candidates to distribute their campaign literature to union members at candidate expense, and to refrain from discrimination among candidates in literature distribution. The LMRDA does not permit, let alone require, the union to evaluate the veracity of the campaign materials. See 29 C.F.R. § 452.70. There was no violation.

For the reasons set forth above, it is concluded that no violation of the LMRDA occurred that may have affected the outcome of the election. Accordingly, the office has closed the file in this matter.

Sincerely,

Patricia Fox
Chief, Division of Enforcement

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