



August 6, 2019

Dear [REDACTED]

This Statement of Reasons is in response to the complaint you filed with the Department of Labor on January 11, 2019, alleging that violations of Title IV of the Labor-Management Reporting and Disclosure Act (LMRDA) occurred in connection with the election of union officers conducted by Local 3, International Union of Operating Engineers (IUOE), on September 1, 2018.

The Department conducted an investigation of your allegations. As a result of the investigation, the Department has concluded, with respect to the specific allegations, that there was no violation of the LMRDA.

You raised several allegations that the union failed to review the eligibility of the Gold Ticket slate of incumbent candidates and failed to be fair in the review of eligibility for the Members First slate of opposing candidates, some of whom were ruled ineligible. Section 401(e) of the LMRDA provides that every member in good standing shall be eligible to be a candidate and to hold office, subject to section 504 and to reasonable qualifications uniformly imposed. 29 U.S.C. § 481(e). The qualifications for candidacy to Local 3 office are contained in Article XII, section 1 of Local 3's bylaws.

Specifically, you alleged that incumbent business manager [REDACTED] should have been declared ineligible to run for office because of disability discrimination that allegedly occurred against a business representative, ending in settlement of a lawsuit, while [REDACTED] was business manager. However, the Department did not uncover any evidence related to this allegation that would have rendered [REDACTED] ineligible to run for office. Section 504 of the LMRDA prohibits anyone who has been convicted of, or served any part of a prison term resulting from conviction of, several enumerated crimes. 29 U.S.C. § 504. Article XII, Section 1(h) of the Operating Engineers Local Union No. 3 bylaws (hereinafter Local 3 Bylaws) further state that no one is eligible for office:

who has been convicted of any crime involving moral turpitude, offensive to trade union morality, or who has been found after trial by the Union or by a Court of Law to have been false to his or her trust or misappropriated Union Funds or property or who has engaged in any conduct prohibited by Section VI (A) of the International Union of Operating Engineer's published "Code of Ethics."

The investigation established that [REDACTED] was not convicted of any crime and that the lawsuit in question was filed against Local 3, not against [REDACTED]. There was no violation.

You also alleged that the union violated section 401(e) of the LMRDA, 29 U.S.C. § 481(e), when it initially ruled nominees [REDACTED] and [REDACTED] ineligible to run for office but later found them to be eligible.

The investigation confirmed that the Local 3 election committee initially ruled [REDACTED] ineligible to run for recording-corresponding secretary. Article XII, Section 1(a) of Local 3's bylaws require candidates for that office, among other requirements, to: have been a Member continuously in good standing in the Local Union for one (1) year preceding the month of nominations; a Member continuously working or having hours reported to the Trust Funds or seeking work (out-of-work list registration) within the jurisdiction of Local 3 for the one (1) year preceding the month of nominations . . . . The investigation disclosed that [REDACTED] was initially disqualified because he was found not to have worked for the past year. However, [REDACTED] appealed the ruling and was ultimately determined qualified based on additional documentation he submitted that supported his eligibility.

The investigation also confirmed that the election committee initially ruled [REDACTED] ineligible to run for District 30 executive board member. Local 3's bylaws provide that candidates for that office, among other requirements, "must be a Member of the District and must have resided within the District continuously for a period of at least ninety (90) days preceding the month of nominations." Local 3 Bylaws, art. XII, sec. 1(c). The investigation disclosed that [REDACTED] was originally disqualified because he was found not to meet the district residency requirement based upon his address in Sacramento County, which appeared to place him in the Sacramento District rather than in District 30. However, [REDACTED] appealed the ruling and was ultimately determined qualified based on additional documentation he submitted showing the location of his ranch on the Sacramento County line.

Both [REDACTED] and [REDACTED] successfully appealed the initial decisions, were found eligible to run for office after they submitted additional documentation supporting their eligibility, and appeared on the ballot. There was no violation.

You also alleged that [REDACTED], nominated for conductor, and [REDACTED] and [REDACTED], both nominated for trustee, were improperly ruled ineligible because their nomination petitions did not contain register numbers for all nominators. You alleged that the nominators were all members in good standing and that the forms contained all the identifying information required by the IUOE.

The investigation established that [REDACTED] were properly ruled ineligible. Local 3's bylaws required each of them to secure nominations from at least 200 members to qualify as candidates for the offices of conductor and trustee. *See* Local 3 Bylaws, art. XII, sec. 1(a). The Department's investigation established that the IUOE does not invalidate nomination petitions for lack of register numbers if enough identifying information is included on the petition. The Department's review of [REDACTED] nomination petitions disclosed that, even if signatures without register numbers were counted, none of them would have had enough nominations to qualify for candidacy. The Department's review established that [REDACTED] secured signatures from 174 unique, eligible nominators; [REDACTED] secured signatures from 83 unique, eligible nominators; and [REDACTED] secured signatures from 92 unique, eligible nominators. There was no violation.

You also alleged that [REDACTED], nominated for District 70 executive board member, secured four nominators from her district and was not given an opportunity to be her own fifth nominator or to obtain one more nominator. You alleged that she was working over 100 miles from her district and was not aware that several of her nominators' home districts were not her home district.

The investigation established that [REDACTED] was also properly ruled ineligible. Local 3's bylaws required her to secure nominations from at least five members of District 70. *See* Local 3 Bylaws, art. XII, sec. 1(c). The Department's review of [REDACTED] nomination petition disclosed that she secured only three valid signatures from identifiable District 70 members, including her own signature. There was no violation.

Finally, you alleged that the election committee improperly waited until the beginning of July to notify those who had been ruled ineligible to run for office. You alleged that, as a result of this delay, those candidates did not appear on the sample ballot. You further alleged that it was improper for the appeal of the eligibility determinations not to occur until July 17, 2018, only three weeks before ballots were mailed.

The Department's investigation confirmed that the names of the disqualified candidates were not included on the sample ballot that was posted and published in the July 2018 edition of Local 3's magazine *Engineers News*. However, the investigation did not uncover any evidence of improper delay in the election committee's eligibility determination process. Moreover, the only candidates whose ineligibility

determinations were reversed on appeal were [REDACTED], and the investigation disclosed that both continued to appear in the Members First slate's campaign materials during the period between the ineligibility determination and the appeal ruling. The investigation further disclosed that a revised sample ballot, including [REDACTED] as candidates for their respective positions, was posted and published in the August 2018 *Engineers News*. There was no violation.

Next, you raised allegations related to Local 3's use of CPA firm Miller, Kaplan, Arase, LLP (MKA) to oversee the election. You alleged that MKA is the Gold Ticket's CPA firm and that it has a close relationship with the incumbent candidates. Additionally, you alleged that the CPA's use of the main union hall in Alameda, California, as the location for the ballot tally introduced opportunities for tampering and fraud. You alleged that the incumbent officers had access cards and they, along with their supporters, were allowed to be inside the building with the CPA for hours before opposing candidates were allowed in. You alleged that incumbent officers entered the building at will while opposing candidates had to sign in and were restricted at times to only one observer and only in certain areas of the building. Section 401(c) of the LMRDA requires a union to provide adequate safeguards to ensure a fair election, including the right of any candidate to have an observer at the polls and at the counting of the ballots. Section 401(c) also prohibits disparate candidate treatment. 29 U.S.C. § 481(c).

The investigation established that the Local 3 executive board hired MKA to manage the election as it has done for past Local 3 officer elections. MKA was responsible for obtaining the post office box for voted ballots and for transporting the voted ballots from the post office to the union. During the investigation, you acknowledged that only MKA had access to the post office box with the voted ballots. You further stated that, on the day of the tally, your slate had observers at the ballot pickup at the post office who then followed MKA as it transported the ballots back to the union. The investigation established that only MKA and members of the election committee had access to the voted ballots as they were carried into the union hall, up the elevator, and into the tally room. The investigation further established that election vendor MK Election Services had control of the voted ballots once they arrived in the tally room. The investigation confirmed that incumbent officers were present in the building prior to the tally, but the investigation established that they did not have access to the ballots. The investigation further established that each candidate was allowed one observer at a time at the ballot tally. There was no evidence of ballot tampering or fraud. There was no violation.

You also alleged that MKA did not allow observers to view the names on envelopes to verify the voters' eligibility. As noted above, the adequate safeguards provision in

section 401(c) of the LMRDA includes the right of any candidate to have an observer at the counting and tallying of the ballots. 29 U.S.C. § 481(c).

The investigation established that each candidate was allowed one observer at a time at the ballot tally. The investigation disclosed that as MK Election Services ran the voted envelopes through its scanner, the names of the voters along with their districts showed up on two television screens in the tally room. The investigation established that observers were allowed to see the names on the ballot return envelopes on the screens, giving them the opportunity to challenge voter eligibility. The investigation also established that Local 3 used the ballot return envelope as a control for voted ballots to ensure that only eligible members voted and that each member voted only once. There was no violation.

Next, you alleged that Local 3 failed to comply with your slate's reasonable request for distribution of campaign material by email. You alleged that your slate's request for campaign email distribution was sent in May 2018 but denied multiple times. You alleged that after you obtained confirmation from election vendor AdMail that emailers were feasible, Local 3 then agreed to allow campaign emails. You alleged that the first campaign email was not sent until July 16, 2018, providing only seven weeks of campaign literature distribution. You also alleged that Local 3 used an incomplete list of members' email addresses for the campaign emails. You alleged that many members did not receive campaign emails even though they had provided their email addresses to Health and Welfare, Fringe Benefits, and the Local 3 credit union. You alleged that the union did not attempt to obtain updated email addresses or cross-reference email lists to obtain a more complete list.

Section 401(c) of the LMRDA requires that a union comply with candidates' reasonable requests to distribute candidate campaign literature and that it treat all candidates equally with respect to the distribution of their campaign literature. 29 U.S.C. § 481(c).

The investigation did not substantiate your allegations that the union denied your request to distribute campaign literature by email or that candidates were treated differently with regard to campaign email distribution. The investigation revealed that candidates in previous Local 3 officer elections had not requested distribution of campaign literature by email and that Local 3 was not immediately prepared to enable such distribution. The investigation established that Local 3 made the necessary vendor arrangements such that both slates were able to send their first campaign emails on July 16, 2018, and to send out campaign emails weekly. The investigation further established that Local 3 does not require members to provide their email addresses to the union. The LMRDA does not impose a duty on a union to maintain or update a list of members' email addresses. The investigation determined that Health and Welfare, Fringe Benefits, and the Local 3 credit union are separate entities from Local 3 and do

not exchange member information, such as email addresses, with Local 3. There was no violation.

You next alleged that Local 3 failed to provide equal treatment to all candidates with respect to the opportunity to publish campaign literature in the *Engineers News*. You alleged that the incumbent candidates posted articles addressing their election platforms and their pictures and biographies in the *Engineers News*, which you alleged was an unlawful use of union resources to campaign.

Section 401(g) of the LMRDA prohibits the use of employer or union funds to promote the candidacy of any person in a union officer election. 29 U.S.C. § 481(g). This provision prohibits any showing of preference by a labor organization or its officers that is advanced through the use of union funds to criticize or praise any candidate for union office. Thus, a union may neither attack a candidate in a union-financed publication nor urge the nomination or election of a candidate in a union-financed letter to members. Courts have consistently held that the tone, content, and timing of union-financed publications determine whether such publication is in fact material promoting the candidacy of a person and thus falling within the section 401(g) prohibition. In addition, as noted above, section 401(c) of the LMRDA requires that a union treat all candidates equally with respect to the distribution of their campaign literature. 29 U.S.C. § 481(c).

The Department's review of the *Engineers News* established that the union magazine did not contain campaign material that promoted any candidates in the election. With respect to the articles written by the incumbent officers, the tone and content of the articles did not rise to the level of unlawful campaigning. For example, there was no mention of the election or inclusion of express campaign statements. The pictures and biographical details of the incumbent officers were regular features of the magazine's coverage of union events of interest to the membership. In addition, during the investigation, you acknowledged that your slate did not request to publish campaign material in the magazine. No candidates were permitted to publish campaign material in the *Engineers News*. There was no violation.

You also alleged that incumbent candidates' campaign literature was distributed by staff and supporters inside union meetings but that opposing candidates' campaign literature was not allowed to be distributed in union meetings. You alleged that union halls are paid for by union dues. As noted above, section 401(g) of the LMRDA prohibits the use of union funds to promote the candidacy of any person in a union officer election, and section 401(c) requires a union to treat all candidates equally with respect to the distribution of their campaign literature. 29 U.S.C. §§ 481(g),(c).

The investigation established that one Local 3 member handed out Gold Ticket campaign material to members prior to the District 1 membership meeting. The investigation did not uncover any evidence that campaign literature was distributed while the meeting was in session. The investigation further established that a Members First slate trustee candidate, [REDACTED], was handing out literature for your slate outside the District 1 membership meeting. The investigation did not uncover any evidence that your slate requested to distribute campaign material inside the meeting and was denied the opportunity to do so. The investigation also did not uncover any evidence that candidates from either slate campaigned inside the buildings at other membership meetings. There was no violation.

You next alleged that Local 3 neglected to provide information to opposing candidates that was available to incumbent candidates regarding campaigning at Local 3 picnics. You alleged that incumbent candidates were informed of campaign requirements for picnics such as permits. You alleged that this prevented your slate from campaigning at some Local 3 events. As noted above, section 401(c) of the LMRDA prohibits disparate candidate treatment. 29 U.S.C. § 481(c).

During the investigation, you stated that the 2018 Local 3 retiree picnic, held at Dixon May Fair fairgrounds, was the only picnic at which your slate was prohibited from campaigning because you did not have a permit. The investigation established that Local 3 employee [REDACTED] was responsible for making staff assignments for the retiree picnic. The investigation further established that Local 3 incumbent president [REDACTED] and incumbent vice president [REDACTED] asked [REDACTED] to find out what the fairgrounds allowed and what the guidance was for free speech areas. [REDACTED] contacted Dixon May Fair and subsequently provided information to [REDACTED], and [REDACTED] explaining that a permit would be necessary to use the free speech area outside the main entrance to the fairgrounds, but no permit would be required for activity on the public sidewalk in front of the fairgrounds. During the investigation, [REDACTED] stated that she would have provided this information to any candidates who asked for it, but no other candidates did. The investigation established that your slate was able to campaign on the public sidewalk outside the retiree picnic, between the designated parking lot and the entrance to the fairgrounds. The investigation further determined that no campaigning was permitted within the picnic area itself; the Gold Ticket's campaign booth was set up just outside the entrance to the fairgrounds. There was no violation.

Next, you alleged that union equipment was used to create Gold Ticket campaign literature and campaign-related social media posts and that a union vehicle was used to transport campaign materials. As noted above, section 401(g) prohibits the use of union funds to promote the candidacy of any person in a union officer election. 29 U.S.C. § 481(g). Accordingly, union officers and employees may not use union funds, facilities,

equipment, or other resources to assist them in campaigning for union office. 29 C.F.R. § 452.76.

During the investigation, you acknowledged that you did not have any evidence to support your allegation that union equipment was used to create Gold Ticket campaign literature or social media posts. The investigation established that the Gold Ticket flyers that were distributed by mail were printed and mailed directly to the members using AdMail's services and did not use union resources. For the Gold Ticket flyers that were distributed by methods other than mail, the Department reviewed the associated printing receipts and confirmed that the Gold Ticket slate did not use union resources to print the campaign flyers. To the extent that Local 3 officers or employees traveled with Gold Ticket campaign material in their union vehicles, such use was incidental to regular union business. There was no violation of the LMRDA.

You also alleged that union staff, including incumbent officers, campaigned to members on job sites during union-paid time. As noted above, section 401(g) of the LMRDA prohibits the use of union funds to promote the candidacy of any person in an election of union officers. 29 U.S.C. § 481(g). Accordingly, union officers and employees may not campaign on time that is paid for by the union. 29 C.F.R. § 452.76.

The investigation established that Local 3 directed officers and staff members to take leave from work to campaign. The Department reviewed incumbent officers' leave records from May 2018 through August 2018 to confirm that they took leave to campaign during the election period. There was no violation.

Next, you alleged that there were at least five postal bins of returned undeliverable ballots at the tally. You alleged that you requested the number of undeliverable ballots from the election committee but your request was denied. You alleged that Local 3 did not send any pre-election notification mailers using the eligible voter address list to correct bad addresses or attempt to update addresses. Under the provisions of section 401(e) of LMRDA, an election notice is required to be mailed to each member at his or her last known home address. 29 U.S.C. § 481(e). As a part of this statutory duty to mail an election notice to each member, a union must make reasonable efforts to keep its membership list current.

The Department's review of the records kept by vendor MK Election Services revealed that, of the 37,146 ballots mailed, only 1,078 — approximately 2.9 percent — were returned as undeliverable. This small percentage of returned undeliverable ballots is indicative of the union's adequately updating its mailing list. Moreover, the election vendor mailed 845 duplicate ballots to updated addresses it identified through the U.S. Postal Service's national change of address (NCOA) database, in addition to mailing ballots to those members' last known home addresses as provided by Local 3. The



Department's investigation also established that Local 3 had a system in place to re-mail undeliverable ballots to better addresses when possible. MK Election Services checked the mailbox where undeliverable ballots were received on a daily basis; those with forwarding addresses were re-mailed, and the remainder were compiled into a regular report sent to MKA and forwarded to the Local 3 office manager, who attempted to obtain updated addresses from those members. MK Elections ultimately re-mailed 265 undeliverable ballots to better addresses. MK Elections also mailed out 150 ballots in response to duplicate ballot requests. There was no violation.

You also alleged that many members never received ballots. You alleged that there were instances of members calling MKA's toll-free number to request duplicate ballots but not receiving ballots. You alleged that 6,956 ballots cast was an extremely low turnout. Section 401(e) of the LMRDA provides that every member in good standing is entitled to one vote. 29 U.S.C. § 481(e).

The Department's investigation did not substantiate these allegations. As discussed above, the percentage of returned undeliverable ballots was very low. The investigation further established that the sample ballot in the August 2018 issue of the *Engineers News*, which was mailed to all members and posted on the union's website, informed members of the toll-free number to call to request a duplicate ballot. The investigation established that the toll-free number generated an email to MKA, which verified the requesting member's eligibility and directed MK Elections to mail a duplicate ballot to the member. The investigation established that MK Elections mailed out duplicate ballots by overnight mail to members who were located in Hawaii and when requests came in close to the ballot return date. You did not identify any members who did not receive ballots whom the investigation confirmed did not receive ballots. As discussed above, the union re-mailed 265 undeliverable ballots to better addresses and mailed out 150 ballots in response to duplicate ballot requests. There was no violation.

Next, you raised several allegations related to the printing and mailing of the ballots and ballot packages. You alleged that 12,000 extra ballots were printed; that 800 voters were sent two ballots due to forwarding addresses at the time of mailing, which you alleged should have been handled prior to the August 9, 2018, mailing; that MKA had to send postcards with corrected ballot instructions to all voters; that members received envelopes without ballots inside; that members received multiple ballots; and that members continued to receive ballots after September 1, 2018. Section 401(c) of the LMRDA requires a union to provide adequate safeguards to ensure a fair election. 29 U.S.C. § 481(c).

The Department's investigation established that AdMail printed an extra 3 percent of each ballot type, resulting in approximately 7,000 extra ballots. During the

investigation, you acknowledged that AdMail destroyed the extra ballots at your insistence, with observers present, at the AdMail facility. The investigation established that MKA took out approximately 50 extra of each ballot type before the rest of the extra ballots were destroyed. Because an undetermined number of ballots were destroyed, no ballot reconciliation was possible. However, the investigation established that only employees of AdMail and MK Election Services had access to the ballots from the time they were printed until the time they were mailed. Observers and AdMail employees were in the printing and mailing facility while the ballot envelopes were being stuffed. MK Election Services took possession of the remaining extra ballots and envelopes after the ballot mailing on August 9, 2018.

As explained above, Local 3 had systems in place for re-mailing undeliverable ballots to better addresses and for responding to members' duplicate ballot requests. The investigation confirmed that Local 3 directed duplicate ballot packages to be mailed to 845 members' last known home addresses in addition to their updated addresses as supplied by the NCOA database. Those 845 duplicate ballot packages were mailed the same day as the rest of the ballots, August 9, 2018. The investigation also confirmed that Local 3 sent postcards to all members to provide complete ballot instructions. In the original printing, MK Elections inadvertently cut off the final line of instructions intended to assure members of ballot secrecy (stating that members' personal "information cannot be linked to your ballot"). These steps did not violate the LMRDA. As noted above, the investigation also established that Local 3 used the ballot return envelope as a control of the voted ballots to ensure that only eligible members voted and that each member voted only once. There was no violation.

You also alleged that your slate's email address was blocked from sending email to any Local 3 email addresses and that incumbent officers told Local 3 office staff not to respond or engage with any candidate, which you alleged violated the section 401(e) right of every member to support the candidate or candidates of his or her choice without penalty, discipline, interference, or reprisal. 29 U.S.C. § 481(e). As noted above, section 401(c) of the LMRDA prohibits disparate candidate treatment. 29 U.S.C. § 481(c).

In its response to your internal protest, Local 3 acknowledged that it instructed its office staff not to engage with any candidates in their capacity as candidates on union time. Local 3 also acknowledged that it blocked email addresses from the Members First slate from emailing Local 3 staff at their union email addresses. Local 3 admitted that this action also blocked the Members First slate's email address from emailing the Local 3 election committee. The Department's investigation confirmed that the Members First slate's email address was blocked from emailing the election committee inadvertently and temporarily. The Department's investigation further established that, during the short period when the slate email address was blocked from emailing the election

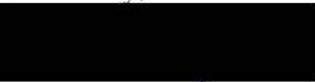
committee, the Members First slate candidates were still able to communicate with the election committee in person, by telephone, and by email from their individual email addresses. The Department's investigation confirmed that Local 3 did not prevent its office staff from supporting the candidates of their choice or from interacting with candidates when not on union time. There was no violation.

You also raised other allegations that, even if true, would not constitute violations of Title IV of the LMRDA.

Finally, you raised allegations in your complaint that had not been raised in your protest to the union. Section 402(a) of the LMRDA requires that a member exhaust the remedies available to him or her under the union's constitution and bylaws before filing a complaint with the Secretary of Labor. 29 U.S.C. § 482(a). These allegations were not properly exhausted and were not investigated by the Department.

For the reasons set forth above, the Department of Labor concludes that there was no violation of the LMRDA with respect to the specific allegations. Accordingly, I have closed the file on this matter.

Sincerely,



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Chief, Division of Enforcement

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