



August 30, 2019



Dear [REDACTED]:

This Statement of Reasons is in response to the complaint you filed with the Department of Labor on July 18, 2018, alleging that a violation of Title IV of the Labor-Management Reporting and Disclosure Act (LMRDA) occurred in connection with the June 25, 2018 election of officers that was conducted by the New York State Public Employees Federation AFL-CIO, Local 4053 (PEF).

The Department conducted an investigation of your allegations. As a result of the investigation, the Department has concluded with respect to each of your specific allegations that no violation occurred which may have affected the outcome of the election.

You alleged that PEF violated section 401(e) of the LMRDA by improperly disqualifying you from running in the election. Specifically, you alleged that the disciplinary process that resulted in your disqualification did not provide adequate due process under the LMRDA.

Section 401(e) provides that "every member in good standing shall be eligible to be a candidate and to hold office" subject to reasonable qualifications uniformly imposed. 29 U.S.C. § 481(e). Under the Department's regulations, a union may bar a member guilty of misconduct from holding office without violating section 401(e), so long as the member has been afforded the rights guaranteed under section 101(a)(5) of the LMRDA. 20 C.F.R. § 452.50. Those rights include that a member must be: "(A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing." 29 U.S.C. § 411(a)(5).

The Department has concluded that you are currently ineligible for union office because of proceedings that afforded you adequate due process under the LMRDA.

I. Background

The Department's investigation established the following facts.

In August 2015, you assumed office as one of PEF's vice presidents. While you were elected on the same slate as PEF president [REDACTED], political disagreements soon emerged between you and [REDACTED]. In or around March 2016, PEF staff members [REDACTED] filed complaints with [REDACTED] alleging that you were abusive towards them. [REDACTED] appointed a professional conduct policy committee (PCP Committee) to investigate the allegations. The PCP Committee conducted its investigation from June 13, 2016 through June 15, 2016 and interviewed thirteen witnesses. The PCP Committee issued a report finding that you engaged in abusive behavior and recommended that [REDACTED] and the Executive Board consider impeaching you. On August 5, 2016, the Executive Board voted on your impeachment, but failed to reach the 60% threshold needed to remove you from office.

On August 22, 2016, the PCP Committee filed a grievance against you with PEF's Ethics Committee. The PCP Committee's grievance alleged that you: 1) threatened [REDACTED] 2) falsely accused [REDACTED] of sexual harassment and making physical contact; 3) ordered [REDACTED] to destroy documents; 4) made false statements against [REDACTED]; 5) verbally abused [REDACTED]; 6) retaliated against [REDACTED] and 7) retaliated against [REDACTED]

[REDACTED] subsequently appointed an ethics hearing panel (First Ethics Hearing Panel)¹ to review the matter. According to PEF's Code of Ethics, "[t]he accused may appear before the Hearing Panel in person and with witnesses to answer the charges. A full and fair hearing will be conducted, with the accused afforded the right to question witnesses and examine any evidence presented by the charging party." However, you alleged that you were not afforded the opportunity to question or cross-examine witnesses, or otherwise examine the relevant evidence, during the First Ethics Hearing.

On July 10, 2017, the First Ethics Hearing Panel issued a report that agreed with the PCP Committee's findings, except for the recommendation that you be impeached. Instead, the First Ethics Hearing Panel recommended that you "be prohibited from holding any elected office in PEF, starting from steward to the highest level of Statewide Office for the next triennial cycle." *Id.* You appealed this decision to the Executive Board during its November 30 -December 1, 2017 meeting. The Executive Board voted to sustain the First Ethics Hearing Panel's discipline.

¹ The investigation revealed that under PEF's rules, the PCP Committee process is not designed to be a due process hearing because it does not impose actual discipline, but rather investigates and makes recommendations. By contrast, PEF's general counsel explained at the impeachment proceedings that the ethics hearing process is intended to be a due process hearing "where there's charges, there's witnesses, there's you know, a final determination and a penalty is imposed." Accordingly, this investigation focused on whether you received adequate due process under the ethics hearing procedures.

On March 13, 2018, you emailed PEF's Triennial Election Committee to verify your eligibility to run as a candidate in the June 2018 election. The Triennial Election Committee responded the same day and said that you were not eligible to run due to the First Ethics Hearing Panel's decision. You asked the Election Committee to reconsider its decision, but the Committee refused to do so. You subsequently appealed to the Executive Board.

You then filed a complaint with the Secretary of Labor on July 18, 2018. In the complaint, you alleged that PEF violated your due process rights in connection with the First Ethics Hearing and therefore "illegally denied" you "the right to run for Office." You further alleged that your disqualification was the result of political animus between you and [REDACTED]

During the course of the investigation, the Department raised questions about the sufficiency of the First Ethics Hearing Panel process, though the Department did not make any final determinations. On October 15, 2018, the PCP Committee filed an "Amended Ethics Grievance Petition" against you based on the same charges as the August 22, 2016 grievance petition.²

[REDACTED] appointed a new ethics hearing panel (Second Ethics Hearing Panel) composed of Executive Board members who did not sit on the First Ethics Hearing panel. The appointments were ratified by the Executive Board. By memo dated December 13, 2018, you and the charging party (the PCP Committee members) received notice that the Second Ethics Hearing Panel would convene on January 14 and 15, 2019. A memo dated January 2, 2019 provided you and the PCP Committee members with supplemental rules of procedure for the hearing and specified that you needed to submit your witness list by January 10, 2019. You provided a list by that date.

The Second Ethics Hearing Panel was a de novo hearing that superseded the First Ethics Hearing Panel. During the Second Ethics Hearing Panel, [REDACTED] represented the PCP Committee. You and [REDACTED] presented your defense. The PCP Committee called [REDACTED] as witnesses. You had the opportunity to cross-examine those witnesses. You called [REDACTED], and yourself as witnesses. During the hearing, you also asked to call [REDACTED] and [REDACTED], arguing that questioning them was central to your defense because they helped author the PCP Committee's report that ultimately led to charges against you. The Second Ethics Hearing Panel denied this request on the basis that you should have included those names on the witness list prior to the hearing.

² The Amended Grievance Petition differed from the first petition only by consolidating the allegations that you made false statements and retaliated against Partridge and by making clear the specific union rules you were alleged to have violated.

The Second Ethics Hearing Panel issued findings on the six charges before it. On two charges, the panel determined that you did not violate PEF's ethics rules or professional conduct rules.³ On two charges, the panel determined that, while your conduct did not violate PEF's ethics rules, it did violate PEF's professional conduct rules.⁴ On two charges, the panel determined that your conduct violated both the ethics rules and the professional conduct rules.⁵ The Second Ethics Hearing Panel recommended that you "not be allowed to fill any vacancy from steward up to and including the office of President, and shall not run for delegate for the remainder of the current term 2018 - 2021 and the entire term from 2021 - 2024." You appealed this decision, but the Executive Board declined to hear the matter.⁶

II. Analysis

Section 401(e) of the LMRDA provides that every member of a union is eligible to run for union office, subject to "reasonable qualifications uniformly imposed." Further, unions are permitted to take disciplinary action against members guilty of misconduct, including barring them from office for a particular time, so long as the action is conducted in accordance with Section 101(a)(5) of the LMRDA. 29 C.F.R. § 452.50. Section 101(a)(5) of the LMRDA provides that a member may not be disciplined unless she has been served with written specific charges; given reasonable time to prepare her defense; and afforded a full and fair hearing. 29 U.S.C. § 411(a)(5).

I need not determine the sufficiency of the First Ethics Hearing Panel, in light of the second, de novo hearing that followed. *See Rosario v. Amalgamated Ladies' Garment Cutters' Union, Local 10, I.L.G.W.U.*, 605 F.2d 1228, 1244 (2d Cir. 1979) (holding that a de novo re-hearing remedied deficiencies that prevented plaintiff from receiving a full and fair hearing before prior disciplinary panels); *see also Perry v. Milk Drivers' and Dairy Emp. Union, Local 302, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 656 F.2d 536, 539 (9th Cir. 1981) ("As an untainted trial de novo, the proceedings before the Joint Council cured any prior deprivation of appellants' right to a full and fair hearing"). I find that PEF satisfied all three of the due process requirements in section 101(a)(5) with respect to the Second Ethics Hearing Panel. I will address each in turn.

A. Written Specific Charges

³ Those charges were: verbally abusing Kerner, and making false statements and retaliating against Partridge.

⁴ Falsely accusing Leo of sexual and physical harassment; threatening Leo.

⁵ Retaliating against Kerner; ordering Partridge to destroy documents.

⁶ Despite your allegations to the contrary, at no point did the Department participate in the disciplinary process.

The investigation established that you received written notice of the specific charges against you in the form of an “Amended Ethics Grievance Petition.” Paragraphs 4a through 4f of that document described the incidents and PEF rules at issue before the Second Ethics Hearing Panel.

B. Reasonable Time to Prepare a Defense

The investigation established that PEF provided notice of the Second Ethics Hearing Panel by memo dated December 13, 2018, delivered via certified and first class mail. The memo notified you that the hearing was scheduled for January 14 and 15, 2019. Therefore, you had about a month to prepare your defense. This is a reasonable amount of time. *See Schrader v. Sheet Metal Workers Int’l Ass’n Local Union No. 20*, 656 F.Supp. 1487, 1494 (N.D. Ind.1987) (forty-one days was sufficient notice); *Falcone v. Dantinne*, 288 F.Supp. 719, 727 (E.D. Pa. 1968) (no violation where union member was notified by letter dated January 30, 1967 of a hearing to be held on February 22, 1967), *reversed on other grounds*, 420 F.2d 1157.

C. Full and Fair Hearing

Courts have routinely held that “[w]hile the union member need not necessarily be provided with the full panoply of procedural safeguards found in criminal proceedings, the fundamental and traditional concepts of due process do apply to the union disciplinary hearing.” *Tincher v. Piasecki*, 520 F.2d 850, 854 (7th Cir. 1975) (citations omitted). Among other things, a member must have a trial by an unbiased tribunal and “a reasonable opportunity to be heard – including the right to present evidence and the right to confront and cross-examine witnesses.” *Falcone v. Dantinne*, 420 F.2d 1157, 1165 (3d Cir. 1969).

You allege that the Second Ethics Hearing Panel did not provide adequate due process for three reasons. First, you allege that the proceeding was biased against you because of your political conflict with PEF president [REDACTED] and for other reasons. Second, you argue that you were not able to call members of the PCP Committee as witnesses, depriving you of the opportunity to confront your accusers. Third, you argue that the PCP Committee and the Second Ethics Hearing Panel shared an attorney before and possibly during the proceeding while you were prevented from bringing counsel. The investigation found no evidence to support these allegations.

1. The Second Ethics Hearing Panel Was Not Biased

In order to establish that a hearing was biased, a member must make a “showing of specific prejudice or a high probability of actual bias on the part of at least some members of the tribunal.” *Loekle v. Swayduck*, 1976 WL 1558, at *4 (S.D.N.Y. 1976), citing

Falcone, 420 F.2d at 1161. You allege that the hearing was biased because: 1) [REDACTED] appointed the panel members even though you two have a long running political conflict; 2) [REDACTED] appeared as a witness against you even though he appointed the panel; and 3) Ethics Chair [REDACTED] provided minor procedural assistance despite having been involved in the earlier disciplinary proceedings against you.

Political differences between panel members and the accused do not in and of themselves cause bias during the disciplinary process. The plaintiff in *Biggerstaff v. Davis*, 1984 WL 49033 (N.D. Ind. 1984) alleged that he was denied an impartial tribunal because “the members of the panel were members, or supporters, of a political slate which plaintiff opposed.” *Id.* at *6. In ruling against the plaintiff, the court noted:

[T]he Local is an intensely political arena, characterized by factionalism and ever-shifting loyalties; in such a context, political allegiances are an inescapable fact. Such allegiances are not, alone, sufficient to establish a lack of impartiality in a tribunal. To establish such a lack it is necessary to establish, directly or inferenti[ally], that one of the members of the tribunal had prejudged the matter at hand.

Id.

In the present case, it is not reasonable to impute the political differences between you and [REDACTED] onto the members of the Second Ethics Hearing Panel. A review of the 2018 Triennial Candidate Election Guide reveals that every member of the Second Ethics Hearing Panel was elected to the Executive Board as an independent, whereas [REDACTED] ran as part of the Members’ Voice slate. Crucially, there is no evidence that the members of the Second Ethics Hearing Panel prejudged the case. [REDACTED] specifically selected members who were elected to the Executive Board during the 2018 election to avoid appointing anyone who had voted on your various appeals to the Executive Board during the prior term. An interview with [REDACTED], the chair of the Second Ethics Hearing Panel, confirms that the members made their decisions independently of [REDACTED] or any political factor.

Furthermore, there is no evidence that [REDACTED] presence as a witness at the hearing impermissibly influenced the proceedings. In *Daniels v. Nat’l Alliance of Postal and Fed. Emp.*, 1985 WL 6408 (D.D.C. 1985), the union president filed charges against several other members, then appointed the committee that adjudicated the dispute. The court held the committee members were not biased because: 1) the president appointed them pursuant to the union’s constitution; 2) there was no evidence the committee members were “operatives” of the president; and 3) there was no evidence the president influenced the committee’s decision-making process. *Id.* at *8. [REDACTED] was not the

accuser in your case, but merely a witness. Nevertheless, *Daniels* provides a useful framework for reviewing your claims of bias. The investigation established that ██████ appointed the Second Ethics Hearing Panel pursuant to the constitution and PEF's Code of Ethics; ██████ did not select political operatives to sit on the panel; and there was no evidence ██████ influenced the decision-making process other than by giving testimony as one of several witnesses.⁷ Accordingly, ██████ appearance before the Second Ethics Hearing Panel did not deprive you of due process.

Finally, there is no evidence that ██████ advice on mere procedural matters tainted the Second Ethics Hearing Panel's conclusions on the substantive issues before it. See *Yager v. Carey*, 910 F.Supp. 704, 717-718 (D.D.C. 1995) (finding that an attorney's guidance to a hearing panel on procedural matters did "not constitute an intervention into the substantive issues involved in the review").

2. Your Right to Call and Confront Witnesses Was Satisfied

You allege that your due process rights were violated because you were not able to call ██████ and other members of the PCP Committee as witnesses, thus depriving you of the opportunity to confront your accusers. The investigation revealed that you had the opportunity to provide a witness list in advance of the hearing, but failed to include the PCP Committee members on your list. "[U]nion members who knowingly fail to exercise rights guaranteed or offered them in connection with union disciplinary proceedings have waived those rights." *Ritz v. O'Donnell*, 566 F.2d 731, 735 (D.C. Cir. 1977).

Moreover, even if your actions did not constitute a waiver, case law is clear that you do not have an absolute right to call members of the charging party:

What is frequently characterized as "the right to confront one's accusers" is, in essence, the right to examine or cross-examine the *pertinent witnesses*. See *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). A person does not have the right to question those who filed charges against him. Those charges may have been based on responsible hearsay, rather than the direct knowledge of the charging party. If the charging party, or his counsel, presents witnesses or other evidence at the proceeding, and the respondent is offered both full opportunity to test the validity of that evidence and the opportunity to call the charging persons as witnesses (even as hostile witnesses) in the event he thinks there [*sic*] testimony will help his case, a full and fair hearing is assured.

⁷ Notably, you had the opportunity to cross-examine Spence during his testimony.

Ritz, 566 F.2d at 736 (emphasis added); see also *Clarke v. District Council of New York City and Vicinity of United Broth. of Carpenters and Joiners of America*, 1982 WL 2012, at *10 (S.D.N.Y. 1982) (holding that the “charging party is not subject to cross-examination” because the charges were not evidence or testimony against the accused). The reasoning in *Ritz* is directly applicable to the present matter. The PCP Committee filed charges not on the basis of direct knowledge, but rather on the basis of complaints made by [REDACTED]. The pertinent witnesses are therefore [REDACTED], not [REDACTED] and the other members of the PCP Committee. You had the ability to cross-examine all of the PCP Committee’s witnesses, including [REDACTED]. While [REDACTED] failed to attend the hearing, this prejudiced both sides, as the PCP Committee intended to rely on her testimony as well. The investigation therefore revealed that your right to call and cross-examine witnesses was satisfied.

3. The Second Ethics Hearing Panel Was Not Biased Merely Because Counsel Advised the Members on Procedural Matters

You allege that members of the Second Ethics Hearing Panel and the PCP Committee shared an attorney before and possibly during the proceeding. The investigation revealed that PEF retained outside counsel who had not participated in the first hearing to provide procedural guidance to the members of the Second Ethics Hearing Panel. At no point did the attorney communicate with the PCP Committee.

You also allege that because the Second Ethics Hearing Panel was able to rely on outside counsel, PEF should have retained counsel for you as well. In support of this argument, you cite a legal treatise that states, in pertinent part:

[Courts have] flatly stated that “the right to be represented by counsel, guaranteed by the Sixth Amendment. . . does not apply to hearings before labor unions.” . . . So long as both the accuser and the accused are placed on a “roughly equal footing” and are bound by the same restriction, the accused has no cause for complaint in the fact that he is limited to being represented at the trial by a member of the United Brotherhood family. . . . [However], if the union is represented by counsel, maintenance of a “roughly equal footing” and a “fair hearing” will demand representation for the accused.

In the present matter, you and your accuser (the PCP Committee) were on an equal footing – neither side was allowed to have legal representation at the hearing. The Second Ethics Hearing Panel was not an adversarial party, but rather a neutral adjudicator. The attorney advised the panel only on procedural matters to ensure the

hearing complied with the demands of the LMRDA. Such an arrangement does not undermine due process. *See Yager*, 910 F.Supp. at 717-718.

III. Conclusion

For the reasons set forth above, the Department concludes that the Second Ethics Hearing Panel complied with the due process requirements of section 101(a)(5) of the LMRDA. Your disqualification from the June 2018 triennial election therefore does not violate section 401(e) of the LMRDA. Accordingly, no violation occurred that may have affected the outcome of the election.

Sincerely,



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