



November 21, 2019

[REDACTED]

Dear [REDACTED]:

This Statement of Reasons is in response to your complaint filed with the Department of Labor on May 31, 2018, under Title IV of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 481-83, concerning the election of officers of the New York City District Council of Carpenters, (NYCDCC or District Council), that occurred at a convention of delegates on December 22, 2017.

The Department of Labor (Department) conducted an investigation of the allegations in your complaint. As a result of the investigation, the Department has concluded that no violation of the LMRDA occurred that may have affected the outcome of the election.

Pursuant to a 1994 Consent Decree between the NYCDCC and the United States Government, the United States District Court for the Southern District of New York (District Court) appointed and granted an Investigations and Review Officer (IRO) certain authority to engage in specific undertakings, among which was the supervision of the District Council's 1995 election, including the promulgation of election rules for that election. Since that time, pursuant to a series of stipulations and court orders, the District Council's officer elections process has been handled by court-appointed officials, known through the years variously as IRO, Review Officer, and Independent Monitor (IM). The Final Rules for the 2017 Election of the Officers of the New York City District Council of Carpenters, July 2017 (Election Rules), as approved by the court, have been incorporated into, and made part of, the Bylaws of the District Council.

The most recent of these elections was held in 2017 under the supervision of court-appointed [REDACTED]. The IM's court-ordered responsibilities include the authority to conduct, overturn, or rerun any or all phases of the election, if necessary; to resolve all election disputes, including election protests; and to certify the election results and, as such, substitute for the District Council's own responsibilities for conducting periodic officer elections and processing election complaints from members (Section One, Election Rules).

The mail ballot election of District Council officers was concluded on December 22, 2017. Candidates ran for executive-secretary treasurer, president, and vice president on four slates: the Solidarity Slate, comprised of incumbents (incumbent slate), Members' Voice Slate (MVS or challenger slate), Working Families Slate (WFS), and Last Stand Slate (LSS) which did not include a candidate for executive-secretary treasurer. The incumbent slate won all offices. The lowest margin of victory in any race was 2,162 votes for the executive-secretary treasurer, the position for which you unsuccessfully ran.

You alleged that the incumbent slate violated Section Three of the Election Rules when incumbents obtained members' telephone numbers using union records and/or union resources and used those phone numbers to send campaign text messages and robocalls to members. Section Three (Campaigning), subsection 3, of the Election Rules specifically imposes a discrimination prohibition regarding the use of membership lists on behalf of candidates: "There shall be no discrimination in favor of or against any candidate with respect to the foregoing." This discrimination prohibition with respect to union membership lists appears to be modeled after section 401(c) of the LMRDA.

Section 401(c) provides, in relevant part:

[e]very national or international labor organization ... shall be under a duty to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organization or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution.

The Department broadly defines the above provision of section 401(c). As a result, every compilation of union members' names/telephone numbers is inferred to have been garnered either directly or indirectly by reason of an incumbent's position of authority.<sup>1</sup> Only if the incumbent slate can clearly and convincingly demonstrate by facts and circumstances that the compilations were truly personal will the incumbent slate be able to overcome the inference that the names/telephone numbers used for campaign texts and robocalls were garnered either directly or indirectly by reason of an officer's or appointee's union position.

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<sup>1</sup> *Marshall v. Local 933, United Auto Workers*, 1980 WL 2020, at \*4 (S.D. Ind. 1980)

Both the incumbent slate and your slate (MVS) campaigned by sending text messages and/or robocalls to members' telephone numbers.<sup>2</sup> Both MVS and the incumbent slate filed a protest with the IM. The IM partially addressed MVS' allegation, interpreting "union records" and "union resources" to mean two things: (1) the use of NYCDCC's membership database known as Fusion; and, (2) the use of the District Council's premises. The IM did not conduct an investigation to determine whether the incumbent slate's personal list of member telephone numbers was acquired while serving in a union capacity.

The IM determined that the incumbent slate did not access Fusion to gather over 9,000 members' names and that neither slate used union premises to campaign, relying on the results of his investigation which included: interviewing District Council employees; reviewing Fusion and other electronic data in the District Council's possession and control; reviewing answers from both slates to a questionnaire the IM formulated regarding incumbent members' campaign practices; the submission of affidavits from incumbent officers; and incumbent slate's receipts from the commercial service that sent robocalls on its behalf, among other things. The District Court affirmed the IM's decision.

With respect to the IM's determination that the incumbent slate did not access and use the Fusion database, the Department's investigation disclosed no evidence that contradicted his determination. In addition, the Department's investigation revealed no evidence that the incumbent slate used union facilities to send campaign text messages and robocalls to council members.

The IM did not, however, consider whether the incumbent slate's list of member telephone numbers was a personal list or a union resource. The IM accepted as true the incumbent slate members' assertions that each contributed his personal list of union member phone numbers to be used for campaigning on behalf of the incumbent slate. The IM did not investigate whether these "personal" lists contained member telephone numbers that those slate members had acquired, either directly or indirectly, by reason of their current or past position(s) in NYCDCC or in any elected or appointed position, past or present, in any union, including those locals that are part of the District Council. Rather, the IM took the incumbent slate members at their word that the list of 9,000 member telephone numbers gathered by the incumbent slate was comprised of each slate member's contribution of his own personal list of member telephone numbers acquired over the years. Regarding the incumbent slate's access to the Fusion database, the IM concluded "that the Solidarity Slate did not obtain any member's personal cellphone number from District Council property, but rather acquired this information

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<sup>2</sup> Because only MVS filed an administrative complaint, this statement of reasons is focused on the MVS and incumbent slates' actions. Further, MVS candidates received the most votes among the unsuccessful candidates, with the other slates' candidates receiving significantly fewer votes than either the incumbent slate or MVS.

directly from their personal files and personal files of surrogates, campaign workers, and supporters.”

The Department conducted its own investigation of whether the incumbent slate’s personal lists may have included members’ contact information obtained as a result of the contributing slate member’s service in a union capacity. The Department reviewed many of the documents on which the IM relied in making his determination, expanding on the IM’s investigation by interviewing various incumbent officers and the MVS slate members regarding their affidavits and/or responses to the IM’s questionnaire.

The Department interviewed five members of the incumbent slate. One who had been an appointed official since 2010 stated that he acquired his personal list of members’ numbers on his cell phone over the last 35 years working as a carpenter. Another incumbent slate member who had been an elected officer since 2002 stated that he acquired his list while serving as a carpenter; yet another who served in elected and appointed positions since 2012, stated that he acquired his list of member telephone numbers over the 37 years of his membership and at “a parade.” A fourth incumbent slate candidate who had been appointed to his District Council position in 2011, stated that he acquired his personal list over 38 years as a member and stored those numbers on his personal cell phone and a rolodex at his home; the fifth incumbent slate candidate interviewed, who had served in appointed and elected NYCDCC positions and in an elected local position, stated that he acquired his personal list of 500 members’ numbers over the years and used them for campaigning in this election and in past elections of his local. He added that his personal list was stored on his personal cell phone and on sheets of paper.

All of these five incumbent slate members were serving in a union capacity for at least five years or more. None of them clearly and convincingly demonstrated that the telephone numbers they acquired while working as a carpenter were distinguishable from any numbers acquired while working in a union capacity. As such, none of these five incumbent slate members was able to overcome the inference that his list of member telephone numbers was garnered either directly or indirectly by reason of his service in a union capacity. Consequently, the lists of member telephone numbers in the possession of each incumbent slate member is inferred to be a union list, and the use of those lists to campaign, by the transmission of campaign texts and robocalls messages, was a violation of section 401(c) of the LMRDA.

But, the Department’s investigation disclosed similar 401(c) violations committed by your slate. Specifically, the investigation disclosed that your list of member telephone numbers was acquired, at least in part, while you served as an instructor with the council apprentice school from 2010-2016. During that time, you collected members’ and apprentices’ telephone numbers while serving in that capacity. In fact, your

employment as an instructor ended after you were accused of calling members and apprentices to vote in the 2016 election. In addition, a member of your slate who contributed 400 numbers to MVS and served as a local vice president and delegate years ago, acknowledged that he had stored an unspecified number of member phone numbers on his personal cell phone; numbers that he acquired while serving in his official capacity with the local. Your fellow slate member was unable to distinguish between telephone numbers he had acquired while serving in his union capacity and those numbers he had acquired outside of his union capacity. Neither you nor he was able to clearly and convincingly demonstrate that each of your lists were not compiled, directly or indirectly, while serving in a union capacity. As such, your slate's list of member telephone numbers is also inferred to be a union list and its use in campaigning on behalf of your slate also violated section 401(c) of the LMRDA.

The only remaining issue is whether the violations committed by the incumbent and challenger slates may have affected the outcome of the election. The Department, after extensive analysis, has nonetheless concluded that these violations may not have affected the outcome of the election. The chart below helps explain this conclusion.

Number of members who voted and whose telephone numbers in Fusion database matched incumbent slate's list	Number of members who voted and whose telephone numbers in Fusion database matched MVS list	Effect on actual voters
1,435	748	687 (1,435- 748)

To determine how many members' votes may have been affected by the unlawful campaign text and/or robocall messages, the Department compared member telephone numbers on both slates' lists with those of member telephone numbers in the Fusion database. When phone numbers on either slate's list matched a member's number in Fusion, the Department assumed that the phone number was obtained while serving in a union official's capacity. Of those members whose numbers matched the Fusion database, the Department's investigation found that 2,183 members actually voted in the election. The incumbent slate's list contained 1,435 of those voters' telephone numbers, compared to 748 on the MVS list. Thus it is apparent that the incumbents were able to reach 687 more members who voted in the election than did MVS.

However, the 687 additional members to whom the incumbent slate impermissibly campaigned is a figure far lower than any margin of victory in the election, including the lowest margin of victory - 2,162 votes - for executive vice president. Consequently, there was no violation that may have affected the outcome.

You made two additional allegations regarding the incumbent slate's campaign text/robocall messages. Specifically, you alleged that the incumbent slate's campaign texts sent to members' cell phones slandered/libeled the MVS candidates by accusing them of serious crimes and may have injured them in their professional capacity. This issue is governed by the Department's interpretive regulation at 29 C.F.R. § 452.70, which states:

The [LMRDA] does not and unions may not regulate the contents of campaign literature which candidates may wish to have distributed by the union. This is left to the discretion of each candidate. The labor organization may not require that it be permitted to read a copy of the literature before it is sent out, nor may it censor the statements of the candidates in any way, even though the statement may include derogatory remarks about other candidates. Furthermore, a union's contention that mailing of certain campaign literature may constitute libel for which it may be sued has been held to not justify its refusal to distribute the literature, since the union is under a statutory duty to distribute material (*footnote citation to case law omitted*).

The investigation disclosed that the campaign messages were paid for by the incumbent slate. As such, the union was not allowed to and the Department will not censor the content of any candidate's campaign material even if the content was libelous. Accordingly, there was no violation.

Lastly, you alleged that the incumbent slate violated a regulation of the Federal Communications Commission (FCC) when it sent campaign texts and left robocall messages on members' cellphones without first obtaining their written permission. The laws administered by the FCC are not incorporated into the LMRDA and the Department does not administer regulations issued by the FCC. There was no violation of the LMRDA.

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,

A black rectangular redaction box covering the signature of Brian A. Pifer.

Brian A. Pifer  
Chief, Division of Enforcement

cc: Mr. Douglas McCarron, General President  
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