U.S. Department of Labor

Employment Standards Administration
Office of Labor-Management Standards
Washington, DC 20210

June 18, 2009

[redacted]

Dear [redacted]:

This Statement of Reasons is in response to your complaint filed on November 12, 2008, alleging that a violation of Title IV of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. § 481-484, occurred in connection with the United Food and Commercial Workers Local 152 ("UFCW Local 152" or "Union") election held on July 25, 2008.

The Department of Labor ("Department") conducted an investigation of your allegations. As a result of the investigation, the Department has concluded, with respect to each of your allegations, that there was no violation of the LMRDA affecting the outcome of the election.

In your complaint to the Department, you alleged that some members of the incumbent slate violated the Act by harassing and intimidating members who supported the challenger slate. You specifically alleged that there was an incident that occurred at the Wildwood Superfresh store location where members were questioned about signing the challengers' petition. You also alleged that a campaign poster of the opposition slate was torn down at the Eat Mor Foods location. The Department interviewed union members at Superfresh and determined that the members were not intimidated or coerced. The Department did confirm that a campaign poster for the challenger's slate was torn down by a business agent at the Eat Mor Foods location but that poster was immediately replaced. There was no evidence that any member did not support any candidate, did not run for office or did not vote because of harassment and intimidation. Multiple interviews did not elicit support for this allegation. There was no violation.

You alleged that a shop steward at the Pathmark store location retaliated against one member for supporting an opposition candidate by increasing his workload and intimidated other members for supporting the same candidate by threatening to put them on the register. The Department investigated the incident at the Pathmark store location to determine if there was a violation of the Act, but found no evidence of coercion or intimidation. Thus, there was no violation of the Act.

In connection with the petitions, you also alleged that the incumbent slate improperly solicited signatures in violation of the union's constitution because the slate did not use official petition forms. The Department found that the petition forms used by one member were not the forms

prescribed by Local 152's Constitution. However, the improper petition forms were not accepted by the union. Thus, there was no violation of the Act.

You also alleged that individuals improperly obtained petition signatures from members at the Marlton Superfresh store location while on union time. Section 401(g) of the Act prohibits the use of union funds to promote the candidacy of any individual in the election. *See* 29 U.S.C. § 481(g). The Department investigated the allegation and found that the individuals gathering signatures at the Marlton Superfresh did so using their vacation time. The Department's regulations recognize that union officers and employees have a right to participate in campaign activities so long as it is not done while on union time nor through the use of union funds. *See* 29 C.F.R. § 452.76. The Department did not find any evidence to indicate that individuals were on union time when seeking petition signatures. The petition forms that were provided to shop stewards were provided during break periods. Thus, there was no violation of the Act.

You alleged that the incumbent slate candidates violated the Act by producing a campaign button using the UFCW International logo which gave the impression that the International endorsed the incumbents' candidacy. Section 401(g) provides that "no moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election." 29 U.S.C. § 481(g). The UFCW Logo is the property of the International United Food and Commercial Workers as an institution, and the use of the logo on campaign literature by any candidate, may constitute a violation of Section 401(g) of the LMRDA in certain circumstances. However, the Department's investigation found that any such violation could not have affected the outcome of the election because the incumbent slate used the union logo on a campaign button which was clearly campaign material and as such did not create a reasonable inference whereby members would assume the International had endorsed their candidacy. In a letter to the Department, UFCW International stated its view that the campaign buttons did not give the impression of an endorsement. For all of the foregoing reasons, the investigation established that the incumbent slate's use of the logo on campaign buttons did not affect the outcome of the election.

You alleged that some members did not receive notice of the election and that other members received only late notice in violation of Section 401(e) of the Act. LMRDA Section 401(e) provides that "not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address." 29 U.S.C. §481(e). The investigation revealed that notice was mailed to the last known home address of 14,892 members on July 10, 2008, within the requisite 15 day period prior to the July 25, 2008 election. No violation occurred.

You alleged that the Election Committee unfairly refused to provide you with information such as names of election judges, number of ballots and the ability of observers to insure a fair election. The Act does not require that the union provide candidates with this information. However, the union may not discriminate against candidates for office. If the union provides the information to one candidate, it is required to provide the information to all. The investigation found that you became aware of this information when it was made public to the members. There was no evidence to indicate that the other candidates, including the incumbent slate, had access to the information any earlier. In addition, you alleged that the union failed to provide

any information regarding the challenged ballots cast during the election. The investigation concluded that there was no important information regarding the challenged ballots that was withheld from you. Thus, there is no evidence that the union failed to provide adequate safeguards to insure a fair election and no violation of the Act.

You alleged that there were an insufficient number of election judges at the polling sites which created an inadequate safeguards violation of section 401(c) of the Act. 29 U.S.C. § 481(c). You appear to refer to the fact that there was only one judge at some of the sites. The union had 161 individual polling sites. The constitution only requires one judge for each polling location. Prior to the election, the Election Committee had created a goal of having two judges at each location. Of the 161 polling sites, 5 sites had one judge instead of two. The Department conducted witness interviews at these five sites in order to determine whether judges followed reasonable procedures to ensure a fair election. The Department confirmed that the judges at these sites were able to safeguard the ballots at all times, including breaks, and properly sealed the ballot boxes. There was no evidence of any violation of the Act or the union constitution and bylaws occasioned by having only one judge at the polling site. Therefore, there was no violation of the Act.

You alleged that an inadequate safeguard violation occurred because election judges were provided ballots 24 to 48 hours in advance of voting during the judge's training meeting. Interviews with witnesses confirmed that there were clear procedures in place, and the election judges followed these procedures to secure the ballots. The Department found no evidence of any wrongdoing by any of the judges. The investigation included a review of the election records. This review revealed no evidence of ballot fraud or tampering. Therefore, there was no violation of the Act.

You alleged that members were forced to vote challenged ballots. Every member was assigned a polling location, if that member went to a different location s/he had to vote a challenged ballot. The Department found that nearly 20% of all voters voted a challenged ballot. While affecting a large percentage of membership, the policy was not unreasonable. It allowed for the union to ensure that although the member was not voting at the assigned location, the member was still eligible to vote and did not vote twice. Members could elect to vote at a polling station other than the location assigned as long as they voted a challenged ballot. There was no evidence to indicate that these members were denied the opportunity to vote. There was no violation of the LMRDA.

You alleged that some polling sites were moved or closed which suppressed voter turnout in violation of Section 401(c) of the Act. The Department found that one polling site was moved, but members arriving at the site were directed to an alternate site to cast their ballots. Another site was closed because an election judge became ill, but members were notified in advance and provided a new polling location. Members were made aware of the changes in an effective manner. There was no evidence that members were denied the opportunity to vote. There was no violation of the Act.

You alleged that the ballot boxes used in the election were not properly sealed allowing ballots to fall out of the boxes. You also alleged that there was a failure to properly count ballots, that the tallying appeared disorganized, and that the tally was not performed according to the bylaws and constitution.

In connection with the sealing of the ballot boxes, you supplied photographs which you claimed demonstrated ballots were protruding from the boxes. The investigation revealed conflicting testimony regarding the sealed ballot boxes and did not find the photographs definitively conclusive. Further, a clerical employee assigned to check the ballot boxes as they were delivered to the counting site stated that none of the boxes were damaged and no tampering was apparent.

With regard to the ballot tally, the investigation revealed that the election was conducted by ballots designed to be counted by machine once a voter had filled in the ballot by darkening the circle choices. However, when some voters made checkmarks or an "x", the machine rejected those ballots. The union then created new ballots mirroring the intent of the voters whose ballots had been rejected by the machine. The union maintained all ballots, readable, non readable and duplicated. The Department conducted a ballot reconciliation and counted the machine readable, non readable and duplicated "A" and "B" ballots. (Voters were given two ballots: "A" ballots contained 3 general officer positions and 13 vice president positions on both sides of the ballot, and "B" ballots contained the remaining 7 vice president positions on a single side of the ballot.) The ballot reconciliation also included a comparison of the number of voters with the number of voted ballots. The ballot reconciliation conducted by the Department revealed a discrepancy of 21 "A" ballots and 45 "B" ballots for a total of 66 unaccounted for ballots.
In addition, the Department conducted a recount of the ballots which revealed a significant discrepancy between the union's vote totals and the actual number of votes cast. In the race for President, the Department counted 4,275 votes for String and 712 for [redacted], compared to the Union's tally of 3,755 for String and 611 for [redacted]. Failure to properly count the ballots violates the adequate safeguards provision of section 401(c) of the Act, 29 U.S.C. §481(c). However, there was no effect on the outcome of the election as the smallest margin of victory was 2,690 for the position of Vice President.

You alleged that observers were not allowed to ride in the vans with the ballots during transport from the polling sites to the tallying site, thereby creating an improper restriction on observers in violation of the Act. You alleged that Local 152 would not allow observers to ride in the vans due to insurance concerns. LMRDA Section 401(c) provides for the right of any candidate to have an observer at the polls and at the counting of the ballots. *See* 29 U.S.C. § 481(c). The majority of ballots were delivered by election judges, but some ballots were transported by van. However, observers were allowed to follow behind the vans to observe transport. The observers were allowed to watch the ballots being placed in the van and removed from the van. The drivers were UFCW members but were not members of Local 152. The investigation confirmed that adequate safeguards were in place, and the drivers transporting the ballots followed reasonable procedures to secure the ballots. The Union, however, failed to inform the challengers of the use of the vans and the routes they would be taking. In any event, as stated

above, the ballot reconciliation revealed a total of 66 unaccounted for ballots. This number is insufficient to have affected the outcome of the election.

You alleged that the union acted improperly by having the election service print 18,000 ballots for 15,000 members, implying ballot fraud. The Department determined that the election service ordered 18,050 ballots for the election, after initially ordering 16,050, but the printer delivered only 16,000 ballots, which included approximately 1,000 extra ballots. The OLMS review of the election records found no evidence of ballot fraud and accounted for all the ballots. There was no violation.

The investigation failed to disclose any violation of the LMRDA which may have affected the outcome of the election. Accordingly, the office has closed the file on this matter.

Sincerely,

Patricia Fox
Acting Chief, Division of Enforcement

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