A/S No. 2004 - 1

UNITED STATES DEPARTMENT OF LABOR
BEFORE THE ASSISTANT SECRETARY
FOR EMPLOYMENT STANDARDS

* *

IN THE MATTER OF

ALBERT SCHMIDT

Complainant

AND

NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Respondent

* *

CASE No. [redacted]

DECISION AND ORDER

This proceeding arose as a result of a complaint filed by Albert Schmidt against the National Federation of Federal Employees (NFFE) under the provisions of the Civil Service Reform Act of 1978 (CSRA) relating to the standards of conduct for federal sector labor organizations, 5 U.S.C. 7120, and the implementing regulations, 29 C.F.R. parts 457-459.[1] The complaint was filed with the Director of the Washington District Office of the Office of Labor-Management Standards (OLMS) on December 23, 1999, pursuant to 29 C.F.R. §§ 458.54 - 458.56. The District Director obtained additional information, found that there was not a reasonable basis for the complaint, and dismissed the complaint on June 23,2000. 29 C.F.R §§ 458.57 - 458.58. The Complainant then requested a review of the dismissal by the Assistant Secretary on July 10,2000, pursuant to 29 C.F.R. § 458.59.

By letter dated November 29,2000, A/S 2001–1, Assistant Secretary Bernard E. Anderson found that there was a reasonable basis for two of the Complainant's allegations regarding an affiliation agreement reached between NFFE and the International Association of Machinists and Aerospace Workers (IAMAW):

1. Whether NFFE failed to provide sufficient information and documents to members (as opposed to local union officials) to enable them to cast an informed and meaningful vote regarding the agreement;

[1] The requirements of the standards of conduct for federal sector labor organizations follow the principles of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), the statute which is applicable to private sector labor organizations. 5 U.S.C. 7120(d). Court decisions under the LMRDA provide guidance when applying the standards of conduct requirements. 29 C.F.R. 458.1.

2. Whether the November 1, 1999 addendum to the affiliation agreement improperly increased member dues.

He therefore directed the District Director to refer the matter to the Chief Administrative Law Judge pursuant to 29 C.F.R. § 458.60 for consideration of these two allegations.[2] Since, according to the documents before the Assistant Secretary, the second allegation had not been protested to the union, the Assistant Secretary also directed the Administrative Law Judge to determine whether that allegation was properly before the Department. Further, the Administrative Law Judge (ALJ) was given discretion to consider the other allegations in the complaint. Finally, the Assistant Secretary noted that the "reasonable basis" standard for referring a bill of rights complaint for a hearing sets a very low threshold, and that the finding that there was a reasonable basis for certain allegations in the complaint should not be construed in any way as ruling on the merits of the allegations based on the facts or the law.'

Administrative Law Judge (ALJ) Linda S. Chapman issued a Recommended Decision and Order on October 30, 2001 recommending that the complaint be dismissed. The Complainant submitted exceptions to the Recommended Decision and Order dated November 14, 2001. The Respondent submitted an answering brief by letter dated December 11, 2001.

After the case had been fully briefed, the Complainant, by letter dated March 4, 2002, advised the Assistant Secretary that he had newly discovered evidence relating to the handling and counting of the ballots in the affiliation vote. By letter dated March 26, 2002, the Acting Assistant Secretary advised the Complainant that he would have to submit a motion pursuant to 29 C.F.R. § 458.82 in order for his request to be considered. By letter dated April 8, 2002, the Complainant submitted, pursuant to 29 C.F.R. § 458.82 and Rule 60(b) of the Federal Civil Judicial Procedure and Rules, a Motion for Post-hearing Discovery and to Reopen the Record on the basis of newly discovered evidence. On May 6, 2002, the Respondent submitted a letter by facsimile transmission with a brief opposing the Complainant's motion.[4]

For the reasons discussed below, I agree with the ALJ that the Complainant has not proven that the Respondent violated its members' rights and I am dismissing all allegations except one. Due to its serious nature, I am referring the issue raised in the Complainant's post-hearing motion to the Administrative Law Judge for a limited inquiry.

I. Background.

In July 1999, NFFE signed an affiliation agreement with the IAMAW pursuant to which NFFE would become NFFE Federal District 1, IAMAW. One of the provisions of the agreement required that the NFFE per capita tax payments come into compliance with those of the IAMAW within six years. In early August 1999, NFFE sent packages to its local unions' officers instructing them to

[2] The Assistant Secretary's letter also noted that the District Director's dismissal of the allegations concerning violations of officers' fiduciary duties, 29 C.F.R. 458.31, is not subject to review by the Assistant Secretary under the regulations.

[3] The Assistant Secretary's letter explained that the purpose for determining whether there is a reasonable basis for a complaint is to screen out allegations which either are based on matters that are clearly not covered by the bill of rights provisions of the regulations, or have no reasonable basis in fact.

[4] The Respondent's answer was not timely pursuant to 29 C.F.R. 458.82, 459.1, and 459.2 and therefore was not considered.

hold a secret ballot vote on ratification of the affiliation agreement in accordance with section 3.10 of the NFFE constitution. The packages included copies of the affiliation agreement, the NFFE and IAMAW constitutions, and material supporting the proposed affiliation.

Each local was allotted a given number of votes based upon the local's proportionate representation within NFFE. The votes from the locals were counted on September 7. Of the approximately 300 NFFE locals, 187 returned Official Tabulation Reports, which were used to indicate the results of the secret ballot elections and to record each local's votes. The votes from 160 locals were ruled valid and counted. Of these 160 locals, 125 locals representing 284 votes (80% of the total votes), supported the affiliation agreement, and 35 locals, representing 86 votes, voted against affiliation. The votes of the remaining 27 locals were not counted: nine because they were received late and 18 because the local unions were not current in dues payments.

On November 1, 1999, an addendum to the affiliation agreement was signed. The addendum required that the NFFE per capita tax payments come into compliance with those of the IAMAW within four years rather than the six years in the original agreement. Also on November 1, the Complainant filed internal charges against the NFFE President and Secretary-Treasurer alleging misconduct in connection with the affiliation vote and requesting the appointment of an impartial investigator in accordance with section 8.2(b) of the NFFE constitution. Having received no response from the union, the Complainant filed the subject complaint with DOL on December 23, 1999.

II. Discussion

A. Allegation Regarding Whether NFFE Failed to Provide Sufficient Information and Documents to Members (as Opposed to Local Union Officials) to Enable Them to Cast an Informed and Meaningful Vote Regarding the Agreement

The Complainant alleged that NFFE did not provide information on the affiliation agreement directly to each member. The issue raised by this allegation is whether NFFE was required to provide detailed information on the proposed merger directly to every member, as the Complainant argues, or whether it was sufficient for NFFE to provide the information indirectly to the members, through the officers of the local unions conducting the affiliation vote.

The relevant provision governing this case is found at 29 C.F.R. § 458.2(a)(1) of the Standards of Conduct Regulations, which states, "every member of a labor organization shall have equal rights and privileges . . . to vote in . . . referendums . . . subject to reasonable rules in such organization's constitution and bylaws." Section 458.2(a)(1) is identical to section 101(a)(1) of the LMRDA, 29 U.S.C. § 411(a)(1). The LMRDA's "equal rights and privileges" clause has been interpreted to prohibit discrimination against classes of members in their right to vote. See *e.g.* Calhoon v. Harvey, 379 U.S. 134, 138-139 (1964). Some courts have expanded upon the Calhoon decision and have held that under section 101(a)(1) members have the right to a meaningful vote. See *e.g.* *McGinnis* v. Local 710, *Teamsters*, 774 F.2d 196, 199 (7th Cir. 1985), *cert.* denied, 475 U.S. 1121 (1986). Other courts have strictly construed section 101(a)(1) to only apply to cases where discrimination against classes of members has occurred. See Ackley v. Western *Conference of* Teamsters, 958 F.2d 1463, 1473 (9th Cir. 1992); Smith v. Mine Workers, 493 F.2d 1241, 1244 (10th Cir. 1974).

The ALJ concluded that, under either of these standards, the Complainant failed to establish a violation of 29 C.F.R. § 458.2(a)(1). The record supports this conclusion. There is no evidence that demonstrates that the procedures used by NFFE discriminated among the classes of members. Under section 3.10 of its constitution, NFFE affiliation agreements must be ratified by the membership either by a majority vote of the delegates attending a convention or by a secret ballot vote conducted within its locals with each local casting the same number of votes the local would be entitled to at a convention. As discussed above, NFFE conducted its referendum using the latter procedure. This procedure gave all members of all locals an equal opportunity to participate in the affiliation vote: there is no evidence in the record that NFFE's members were treated unequally with regard to any aspect of the affiliation vote.

The record also fails to support the Complainant's assertions that members were denied a meaningful vote. It is undisputed that NFFE locals were sent information concerning the merger and instructed to hold a vote pursuant to section 3.10 of the NFFE Constitution. The Complainant introduced no evidence that any member sought information about the affiliation and was unable to obtain it. Even more importantly, as the ALJ observed in her Recommen ed Decision and Order, "there is not a shred of evidence to suggest that the local union officers did not share this information with their members." Recommended Decision and Order, footnote 13. In his brief in support of the exceptions, the Complainant argued only that NFFE did not direct locals to disseminate affiliation information to their members and that there is no evidence that the information was disseminated. This argument ignores the fact that Complainant had the burden of proving the allegations of his complaint in this proceeding by a preponderance of the evidence. 29 C.F.R.§ 458.79. Because there is no evidence demonstrating that the locals failed to make affiliation information available to their respective memberships, the Complainant plainly failed to meet the burden of showing that NFFE members were denied a meaningful vote.

Further, the Complainant failed to except to the ALJ's factual findings that "[t]here is no evidence that NFFE misled members, favored some local unions with more information than others, engaged in foul play, or did anything to prevent a fair and democratic vote." Recommended Decision and Order, p. 11-12. Rather, the Complainant excepted only to the ALJ's legal conclusion on this issue, which was essentially that absent such evidence NFFE was under no obligation to send information regarding the affiliation vote directly to members rather than relying on local union officers to share the information with members. None of the cases cited by the Complainant for the proposition that a union must provide detailed information directly to its members, however, establish that either section 101(a)(1) of the LMRDA (for private-sector unions) or 29 C.F.R. § 458.2(a)(1) (for Federal-sector unions) require a union to provide information on a referendum vote directly to every member. Most of the decisions cited by the Complainant involved cases where the union committed vote fraud, deliberately supplied misinformation, suppressed dissent, or refused to comply with requests to distribute opposing information. Bunz v. Moving Picture Operator's Local 224, 567 F. 2d 1117, 1121 - 22 (D.C. Cir. 1977) (member's equal rights violated where union officials circulated inadequate or misleading information, refused to provide opponents access to a membership mailing list or implement a properly conducted vote, or where irregularities occurred in counting ballots); Cefalo *v. Moffett*, 333 F. Supp. at 1286-87 (officers withheld information, and union staff who would receive large pecuniary benefit from merger controlled a significant number of votes); Young v. Hayes, 195 F. Supp. 911, 916-17 (D.D.C. 1961) (equal right to vote denied when members were misinformed about proposals); Gee v. Textile Processors, 164 LRRM 2049, 2056 (N.D. Ill. 2000) (union "distorted the information sent out and . . . denied [opponents] the

opportunity to communicate their views"). Several of the decisions the Complainant cites refer to the need to have informed debate and to open channels of communication. Sertic v. Carpenters, 423 F.2d 515, 521 (6th Cir. 1970) (meaningful vote is not a deliberately uninformed vote); Richard v. Robinson, 164 LRRM 2475,2476-77 (N.D. Ga. 2000) (information sent only in English to non-English speaking members not adequate). However, as the ALJ found, there is no evidence that there was not an informed debate or that NFFE closed channels of communication. In addition, the ALJ found that the Respondent did not commit any of the deceptive actions discussed in the cited decisions. Specifically, the ALJ did not find evidence that NFFE "misled members," "favored some local unions with more information than others," "engaged in foul play," "did anything to prevent a fair and democratic vote," or "suppressed dissident views on affiliation or denied opponents the opportunity to provide information to members." Recommended Decision and Order, p. 12. The record supports these findings.

Finally, even Blanchard v. Johnson, 388 F. Supp. 208, (N.D. OH 1974), *aff'd in part*, 532 F.2d 1074 (6th Cir. 1976), which contains language suggesting the strongest support for the Complainant's argument, is distinguishable. In Blanchard, a local union mailed each of its members an affiliation referendum ballot, together with a letter that purported to represent the entire affiliation agreement, but failed to mention oral agreements relating to the affiliation agreement and constitutional provisions of the proposed affiliating union. 388 F. Supp. at 212. The district court held that the referendum could not proceed until, among other things, there was a "full disclosure of all the terms of all affiliation proposals, as well as copies, or provisions of the constitution of the organization with which affiliation is to be considered and voted upon." Id. at 215. The court in Blanchard did not consider the question presented here – whether a national union is obligated to communicate directly with members of its constituent locals regarding a planned affiliation referendum – but, rather, whether a local union that provided its members with limited and possibly misleading information about affiliation questions was required to fully disclose the terms of all affiliation proposals in order to meet its obligation under the statute and its own constitution to ensure members an opportunity for a meaningful vote. Id. at 213-215. Blanchard provides no support either for the argument that a national labor organization must disseminate information directly to members of its constituent locals regarding affiliation questions or for the proposition that the "equal rights and privileges" clause requires that information be provided by any particular means to every member who is eligible to vote in an affiliation referendum.

In the instant case, NFFE made the affiliation agreement, copies of the NFFE and IAM Constitutions, and information about the IAM available to its members through its locals. There is no evidence that members were denied access to these materials, or that the materials were misleading or otherwise deficient. Neither 29 C.F.R. § 458.2(a)(1) of the Standards of Conduct Regulations, nor the comparable section of the LMRDA, 29 U.S.C. § 411(a)(1), expressly require direct dissemination of information to union members. I therefore affirm the ALJ's conclusion that the Complainant did not establish that NFFE was required to provide information on the affiliation vote directly to every member and violated 29 § 458.2(a)(1), or that NFFE's distribution of information through its locals deprived members of an opportunity for a meaningful vote in the affiliation referendum.

B. Allegation Regarding Whether the November I, 1999 Addendum to the Affiliation Agreement Improperly Increased Member Dues

The Complainant alleged that the addendum to the affiliation agreement improperly increased membership dues in violation of the procedural requirements of 29 C.F.R. § 458.2(a)(3), which regulates the ability of unions to increase ***member dues.*** The addendum requires that the NFFE per capita tax payments come into compliance with those of the IAMAW within four years rather than the six years provided in the original affiliation agreement.

As stated in A/S No. 2001–1, there is an initial question as to whether this allegation is properly before the Department in that it was not raised in the Complainant's internal union protest. Although the Complainant sought to exhaust his internal union remedies with respect to allegations relating to the referendum vote, he never filed a complaint with NFFE regarding his assertion that the addendum to the affiliation agreement was an improper increase in member dues. He asserted that filing a complaint was not necessary, because he had received no response to his first complaint and therefore filing a second complaint would have been futile. The ALJ rejected the Complainant's argument that he was not required to exhaust internal remedies, finding that the Complainant failed to establish either that NFFE wrongfully failed to process the first complaint or that bad faith on the part of the deciding officials could be "inferred from any of the circumstances surrounding the grievance process." Recommended Decision and Order, p. 16. Under these circumstances, the ALJ did not abuse her discretion in concluding that the Complainant was required to exhaust internal union remedies with respect to this issue and failed to do so. It is unnecessary to consider whether the ALS also properly concluded that the Complainant's argument fails on the merits because the change in the per capita tax paid by NFFE to IAMAW did not affect the per capita tax paid by the locals to NFFE or dues paid by NFFE members, and the members will have an opportunity to vote on any proposed increase in the per capita tax paid by the locals to NFFE and on any proposed increase to their individual dues.

C. Motion for Post-hearing Discovery and to Reopen the Record

In his Motion for Post-hearing Discovery and to Reopen the Record on the basis of newly discovered evidence, the Complainant stated that the former NFFE Secretary-Treasurer informed him on January 25, 2002, that he had provided false information to the Department during its initial inquiry and gave perjured deposition testimony in connection with the hearing. The complainant also stated that the former NFFE Secretary-Treasurer informed him that he had destroyed and falsified the ballots and other records relating to the affiliation vote, that the affiliation had in fact been defeated by the membership, and that he had documents reflecting how he tampered with the affiliation vote. The Complainant further stated that the former NFFE Secretary-Treasurer was reluctant to testify to this new information without immunity, but would testify and provide supporting documents in response to a subpoena that granted immunity.[5] The Motion was accompanied by a Declaration from the Complainant setting forth a conversation he allegedly had with the former NFFE Secretary-Treasurer on January 25, 2002. Based upon the information in the Motion and Declaration, the Complainant requested that the Secretary not only reopen the record, but also issue a subpoena to the former NFFE Secretary-Treasurer under LMRDA section 601, 29 U.S.C. 521.

[5] The immunity cases cited by the Complainant were issued prior to the 1970 amendments to 15 U.S.C. $49 which is referenced in 29 U.S.C. 601 as forming the basis for the Secretary's investigative powers. Since the 1970 amendments deleted the immunity provision in section 49, the value of the cases cited by the Complainant is questionable.

The Assistant Secretary does not have authority to issue a subpoena in this proceeding because the standards of conduct provisions of the CSRA do not provide such authority. In addition, LMRDA section 601, which the Complainant cites in his post-hearing motion, provides investigative and subpoena authority only for possible violations of the LMRDA. At the time of the events that gave rise to this complaint, however, the Respondent was not a labor organization within the meaning of the LMRDA, sections 3(i) and (j), in that it did not exist for the purpose of dealing with a private sector employer as defined in section 3(e). See Reed v. Sturdivant, 176 F.3d 1051 (8th Cir. 1999). Moreover, even if the Respondent were a labor organization under the LMRDA, section 601 expressly exempts from the Department's investigative and subpoena authority possible violations of LMRDA Title I, Bill of Rights of Members, which is the substance of this proceeding.

Furthermore, the Complainant's assertions of improper conduct by the former NFFE Secretary-Treasurer appear inconsistent with the findings of the District Director on the handling of the ballots. In the Statement of Reasons, mailed to the Complainant on June 23,2000, the District Director stated that: "two employees of NFFE observed [the former Secretary-Treasurer] open all of the ballot envelopes and remove the ballots. They did not notice any ballot envelopes opened prior to this process. They did not notice any ballot tampering before or during the tally." Statement *of* Reasons, p. 2. Nonetheless, the Complainant's Declaration alludes to potential evidence that was unavailable to the District Director when the District Director prepared his Statement of Reasons for dismissing the second group of allegations. This Complainant's Declaration creates disputed issues of fact, which cannot be resolved without additional fact-finding. Because of the serious nature of the assertion that prior proceedings in this case may have been tainted by perjured testimony, I find that there is a reasonable basis for the Complainant's allegations that the ballots were not adequately safeguarded and counted. Therefore, I hereby remand this aspect of the case to the ALJ for the limited purpose of reopening the record to permit the Complainant an opportunity to adduce evidence in support of his allegations.

D. The Remaining Allegations

In A/S No. 2001–1, the Assistant Secretary affirmed the dismissal of two of the Complainant's allegations: (1) NFFE did not advise locals of dues arrearage in time for them to make payments to be eligible to vote; and (2) NFFE did not provide adequate safeguards in handling and counting the ballots. The adequate safeguards allegation is discussed and resolved in C above.

As to the notice issue, the Assistant Secretary stated that there was not a reasonable factual basis for this allegation based on the findings of the District Director, [6] but that the ALJ had the discretion to further examine this allegation and determine whether to consider it. In her Recommended Decision and Order, the ALJ declined to reach this allegation because her authority is limited by 29 C.F.R. § 458.60 to consideration of allegations with respect to which the District Director has made a finding of a reasonable basis for a complaint. Without deciding whether there may be circumstances in which an ALJ may consider issues raised for the first time at a hearing (as, for example, where facts not previously known to the Complainant become clear at the hearing), I agree that where, as here, an allegation is presented to the Assistant Secretary, on a request for review of a determination by a District Director that there is no reasonable basis for proceeding, the ALJ may rule on the issue only

[6] In his Statement of Reasons, the District Director determined that "the issue of dues arrearage [of the locals was] settled, before the results were registered."

if the Assistant Secretary reverses the District Director's finding and determines that there is reasonable basis to proceed. In this case, the Complainant has presented no facts or arguments that would merit reconsideration of the allegation concerning the alleged lack of notice to locals about their per capita tax arrearage and the lack of safeguards in the ballot tally. I therefore reaffirm the finding by the District Director, indicated in A/S No. 2001-1, that there is not a reasonable basis for this allegation.

With respect to the Complainant's other allegations that (1) at least some NFFE locals did not conduct the affiliation votes by secret ballot, and (2) NFFE violated its Constitution by directing that the election be conducted in 30 days rather than 60 days, the evidence demonstrates that the Complainant did not raise these allegations either in his internal protest to the union or his original complaint to OLMS.[7] Furthermore, the Complainant failed to offer any explanation for not raising these allegations to the union or in the complaint to OLMS. This failure is inconsistent with the procedures set out in 29 C.F.R. §§ 458.54 – 458.62, which are intended to narrow the issues by allowing the union an opportunity to correct violations, and to dismiss issues that do not have a reasonable basis to proceed. Therefore, I find that these two allegations are not properly before me.

Upon consideration of the entire record in this case, I find that the Complainant has not established a violation of 29 C.F.R. §§ 458.2(a)(1) or (3). As noted above, however, I remand this case to the ALJ for the limited purpose of reopening the record to provide the Complainant with an opportunity to present evidence indicating that testimony previously presented in these proceedings may have been perjured. Absent such evidence, the ALJ's decision will be affirmed in its entirety.

ORDER

IT IS HEREBY ORDERED THAT this case be remanded to the Administrative Law Judge for the limited purpose of reopening the record to provide the Complainant with an opportunity to present evidence indicating that testimony previously presented in these proceedings may have been perjured;

IT IS FURTHER ORDERED THAT the remaining allegations be, and they hereby are, dismissed.

Dated: October 30, 2003

Victoria A. Lipnic

Victoria Lipnic
Assistant Secretary

[7] The ALJ noted that the Complainant dropped the remaining allegations concerning the failure to disseminate opposing views, provide opponents with access to membership mailing lists, permit opponents of affiliation to use union resources, and to instruct the locals to conduct secret ballot votes.