UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HILDA L. SOLIS, Secretary of Labor, United States Department of Labor, Plaintiff, v. **LOCAL 234, TRANSPORT WORKERS UNION** Defendant.	Civil Action No. 08-CV-1957 (LDD)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN SUPPORT OF CERTIFICATION OF THE SECRETARY'S SUPERVISED ELECTION AND RESPONSE TO THE INTERVENORS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Hilda L. Solis, Secretary of Labor, United States Department of Labor (Department or Secretary), by and through her undersigned attorneys, hereby requests that this Court grant summary judgment in her favor. This action is brought by Plaintiff pursuant to Title IV of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. §§ 401, *et seq*., (LMRDA or Act), which governs the conduct of union officer elections.

Section 402 of the LMRDA, 29 U.S.C. § 402, mandates that the Secretary, having conducted a new, supervised election, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization, shall promptly certify to the court the names of the persons elected, and the court shall thereupon enter a decree declaring such persons to be officers of that union.

Local 234 concluded its election, under the Secretary's supervision, on September 24, 2010. The intervenors, losing candidates for union office, protested the election.[1] The Secretary thoroughly investigated each allegation but found no violations that may have affected the outcome of the election. *See Declaration of Patricia Fox, Exh. 2 (hereinafter "Fox Decl.")* The Department submitted to the court a Certification of the supervised election, along with the Fox Declaration. *Certification of Election, Exh.* 3. Intervenors objected to the Department's Certification, challenging the basis for the Department's investigative findings and legal conclusions on four issues. *Intervenors' Brief (hereinafter "Br.").*

Plaintiff is entitled to judgment in her favor because there is no genuine issue as to any material fact and the Secretary's decision to dismiss Intervenors' post-election protest was neither arbitrary nor capricious.

I. INTRODUCTION

On April 25, 2008, the Secretary filed a Complaint pursuant to Title IV of the LMRDA alleging that the application of the union's nominations procedures, among other violations, may have affected the outcome of Local 234's September 28, 2007 election for all offices. *Complaint, Exh. 4.* The Secretary sought to void the September 28th election and hold a new election under her supervision. *Complaint, Exh. 4.* On July 16, 2010, Local 234 agreed to have the Secretary supervise its next regularly scheduled election. This Court entered an Order, dated July 19, 2010, approving the parties' agreement by Consent Decree. *Consent Decree, Exh. 5.*

The Office of Labor Management Standards ("OLMS"), the agency authorized to enforce the LMRDA and act on behalf of the Secretary, designated Investigator Dona Thompson as the Election Supervisor. *Complaint, Exh. 4; Fox Decl., Exh.2.* The Election Supervisor, on July 20, 2010, mailed an invitation to attend a pre-election conference to all members of the 2007 election

[1] Intervenors' post-election protest, ("Protest"), Exh. 1.

committee and to all candidates from the previous election.[2] *Facts ¶¶ 4-5; Invitation to Attend Pre-Election Conference, Exh. 6.*

Candidates were aligned on two slates. One slate was headed by intervenor Willie Brown for President, and intervenor Brian Pollitt, for Executive Vice President. Facts ¶ 7. Both Brown and Pollitt were the incumbent officers. Their slate – the incumbent slate – was named the Unity Team. Facts ¶ 7. The other slate – an insurgent slate -- was headed by John Johnson and named the New Direction Team. Facts ¶ 7.

The Pre-Election Conference was held on July 30, 2010. *Fox Decl., p. 1 Exh. 2.* The Election Supervisor advised attendees of her responsibilities as the designated election supervisor, explaining that she was responsible for assuring the conduct of a fair election under the Act and, insofar as practicable, ensuring that the election was in conformity with the Local 234 Constitution (Local 234 Constitution) and the Transport Workers of America Constitution and Bylaws (International Constitution). *Election Rules, p.1, Exh. 7.* The Election Supervisor placed attendees on notice that the Election Rules were subject to modification. *Election Rules, p. 10, Exh. 7.* Once the Election Supervisor finalized the Election Rules, she mailed them to all attendees of the pre-election conference on August 4, 2010. *Pre-Election Conference Letters Mailed to Members, with Election Rules attached thereto, Exh. 8.*

The Election Supervisor controlled and directed every aspect of the election to ensure its fairness. *Facts ¶ 6; Election Rules, p. 10, Exh. 7.* As a result, during the course of the supervised election, she acted immediately to resolve every election-related issue brought to her

[2] All references to "Facts" refer to the Secretary's Statement of Material Facts, which is attached to this motion. The Secretary's Statement of Material Facts responds, by numbered paragraphs, to the Intervenors' Statement of Undisputed Material Facts.

attention. Among those issues were Johnson's use of the union logo,[3] the unreliability of the Local's and SEPTA's records to determine the continuous good standing of the Local's members,[4] SEPTA's purported unfair treatment of intervenors' supporters,[5] and the request to use robocalls.[6]

The insurgent slate won every office by a seven percent margin. *Facts ¶ 8*. In the Secretary's experience and expertise in union elections, this is a significant victory, as incumbent union officers generally have a built-in advantage against challenging candidates. *Facts ¶ 8; Election Results, Exh.18*.

II. SCOPE OF JUDICIAL REVIEW

The Secretary's determination that there were no violations of the LMRDA that may have affected the outcome of the union's supervised election is reviewed under the familiar "arbitrary and capricious" standard of the Administrative Procedure Act. 5 U.S.C. § 706. The court must "determine whether the Secretary's action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law - in this case the legal requirements of § 402 of the Act." [7] *Hodgson v. Carpenters Resilient Flooring, Local Union No. 2212,* 457 F.2d 1364, 1370. (3d Cir. 1972).

A. The Supreme Court dictates that the review of a Secretary's decision concerning a union election is narrow and deferential.

In *Dunlop v. Bachowski*, 421 U.S. 560 (1975), the Supreme Court held that the arbitrary and capricious standard was limited, stating that there was "a congressional purpose narrowly to

[3] *Memo: U-tube Campaign Video, Exh. 9; Memo: Campaign with union logo, Exh. 10; Memo: Election Day Polling Site Info, Exh. 11; Memo: Election Protest - Allegation 9 - use of union logo, Exh. 12.*
[4] *Memo: Eligibility Rules, Exh. 13; SEPTA no earnings record, Exh.14; SEPTA leave record, Exh.15.*
[5] *Report of Interview John Carson, Exh. 16.*
[6] *Memo: Robocalls, Exh. 17.*
[7] Section 402(c) of the Act, 29 U.S.C. § 482(c), provides that a union election supervised by the Secretary be conducted "so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organizations," that the Secretary "promptly certify the names of the persons elected," and that "the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization."

limit the scope of judicial review of the Secretary's decision." *Id.* at 568. While the type of Secretarial determination on review here involves a supervised, rather than an unsupervised election (as in *Bachowski*), that distinction does not alter the requirement that judicial review of the Secretary's determination must be very narrow. The intervenors' attempt here to re-open the entire record, present factual material that was not presented to the Secretary during the consideration of the election protest, and, effectively, to have the Court conduct a *de novo* trial of the Secretary's determination is not proper.

In *Bachowski*, the Court set aside the lower court's order permitting a challenge to the "factual basis" of the Secretary's decision not to bring suit to challenge a union election. 421 U.S. at 560-61. The Court made clear that because the statutory scheme relies on the "special knowledge and discretion of the Secretary" as to the probable violation and the probable effect determinations, "the reviewing court is not authorized to substitute its judgment." 421 U.S. 572. And, although the Secretary must supply a statement of reasons for his actions, "except in what must be the rare case, the court's review should be confined to examination of the reasons statement, and the determination whether the statement without more evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious." 421 U.S. at 572-73. If that statement of reasons were inadequate, then the reviewing court could allow the Secretary to provide additional information to bolster that statement. 421 U.S. at 574. The Supreme Court made clear that, in challenging the Secretary's decision, a complainant may not have "the full trappings of an adversary trial of his challenge to the factual basis for" that decision. *Id.* at 577. The Supreme Court actually went further; the decision delineated a scope of review "much narrower than applies under 5 U.S.C. § 706(2)(A) in most other administrative

areas." *Id.* 421 U.S. at 590 (Burger, C.J., concurring); *Usery v. Local 639, Int'l Bhd. of Teamsters*, 543 Fl.2d 369, 378 (D.C Cir. 1976) (*Teamsters Local 639).*

In *Teamsters, Local 639,* the D.C. Court of Appeals concluded that the reasoning of *Bachowski* overruled the Third Circuit's suggestion in *Carpenters, Local 2212,* that judicial review of the factual determinations made by the Secretary might be appropriate in a challenge to a supervised election (as is presented here). The D.C. Circuit explained:

> We recognize that at the remedial stage the court has a broader scope of decision than it does with respect to the Secretary's determination whether or not to bring the original suit. Nonetheless, considerations of "special knowledge and discretion" are applicable, particularly where the election is held under the Secretary's ongoing supervision and control. Indeed, because of the Secretary's oversight and familiarity, the rerun, if certified, enjoys a "presumption of fairness and regularity." Moreover, the statutory concern with expeditious resolution of post-election disputes is no less present at this stage, indicating the need for a foreshortened review process.

543 F.2d at 378. Other courts have adopted the same approach, using similar reasoning, and have reviewed the Secretary's certification of a supervised election using a deferential standard. *See Donovan v. Local 6, Washington Teachers' Union,* 747 F.2d 711, 715 (D.C. Cir. 1984); *See also, Brennan v. Local 551, United Auto. Workers*, 486 F.2d 6, 8 (7th Cir. 1973) (party objecting to decision of Secretary during supervised election assumes heavy burden of proof and persuasion to show that the Secretary's actions are arbitrary and capricious). Indeed, one Circuit Court of Appeal and at least one district court have effectively declined to permit any challenge to the Secretary's certification. *Usery v. District No. 22, United Mine Workers*, 567 F.2d 972 (10th Cir. 1978); *Martin v. Int'l Org. of Masters, Mates and Pilots,* 786 F.Supp.1230 (D. Md. 1992).

B. A trial-like review of the Secretary's decision is improper.

Intervenors' position that judicial review of a supervised election is fundamentally different from that of an unsupervised election – and allows for a trial-like consideration -- ignores the fact that the certification of supervised election results involves discretionary functions similar to those involved in an investigative review of unsupervised elections. *See Master, Mates, and Pilots*, 786 F.Supp. at 1236. In both cases, the LMRDA tasks the Secretary with determining whether there were election violations and, if so, whether such violations require a new election. The fact that, in one case – the unsupervised election – the Secretary learns of potential problems after they happen and that, in the other – the supervised election – the Secretary learns of potential problems as they happen, is a distinction without a difference. The analysis that the Secretary undertakes is the same in both cases.

If the distinction between an unsupervised and a supervised election makes any difference, it should be in favor of more limited review of a supervised election. Because of the Secretary's expertise and specialized knowledge, a supervised election, under the control of the Secretary, enjoys a "presumption of fairness and regularity," which is not upset simply because of the existence of election violations. *Masters, Mates, and Pilots*, 786 F.Supp. at 1236. Successive rounds of elections, challenges, trial-like litigation, new elections – ad infinitum – also undermines the "congressional objectives not to permit individuals to block or delay resolution of post-election disputes, but rather to settle as quickly as practicable the cloud on the incumbents' title to office; and to protect unions from frivolous litigation and unnecessary interference with their elections." *Bachowski*, 421 U.S. at 573 (internal quotation marks omitted). For this reason, a second supervised election should not be ordered unless the court finds egregious conduct in the supervised election. *Teamsters Local 299, Teamsters*, 515

F.Supp. at 1281-86 (no second supervised election ordered, even though Secretary found three violations of the LMRDA, including use of employer funds to display campaign poster); *UAW Local 551,* 486 F.2d at 8 (upholding decision not to postpone election during snowstorm); *see Local 998, Amalgamated Transit Union*, 570 F.Supp. 716, 721 (E.D. Wisc. 1983) (court cannot act as Election Supervisor and conduct its own investigation of the election).

In asking the court to ignore the *Bachowski* standard of review, the intervenors rely primarily on the Sixth Circuit's decision in *Donovan v. Westside Local 174,* 783 F.2d 616 (1986), a post-*Bachowski* decision. *Br. at 3.* In that decision, the court stated that it was not appropriate to follow *Bachowski* in the review of a supervised election, because limiting the scope of review to the issue of "whether the Secretary's statement of reasons was arbitrary and capricious" would improperly limit the court in evaluating "allegations directed at the Secretary and not the union." *Id.* at 625. In the Department's view, the *Westside Local 174* court misread the scope of *Bachowski.* Nothing in that decision eliminated a court's power under the APA to overturn a decision by the Secretary that is an "abuse of discretion" or "contrary to law." 5 U.S.C. § 706. In this regard, *Bachowski* specifically acknowledged that "the court should determine whether the Secretary's decision was reached for an impermissible reason or for no reason at all." 421 U.S. at 573. The court thus has the authority – even if it is limited to a review solely of the Secretary's statement of reasons – to resolve allegations directed at the Secretary, contrary to the Sixth Circuit's implication in *Westside Local 174.*

To the extent that *Westside Local 174* states that a court should routinely look beyond the declaration provided by the Secretary and re-litigate the factual issues considered during the protest, that decision is inconsistent with the majority of cases that have considered this issue,

described above, and should not be followed. This Court should limit its review to the factual and legal conclusions set out in the Fox Declaration.

C. The proper review here is under the arbitrary and capricious standard.

Even assuming that the Court applies the pre-*Bachowski* standard of review that the Third Circuit describes in *Carpenters, Local 2212*, the Court's task is much more circumscribed than the intervenors suggest. Perhaps the Court can look beyond the Fox Declaration to consider the evidence that the intervenors put forth in their brief. That is all the evidentiary hearing to which the intervenors may be entitled. If the Court does look beyond the Fox Declaration – and finds it in any way lacking – the Court may examine the evidence the Secretary is providing along with this brief, evidence that support her decision and bolsters the reasons for her actions.[8] The Court still must review all of that evidence – and the Secretary's actions – in light of the "arbitrary and capricious" standard.[9] Nothing in *Carpenters, Local 2212* undermines that basic tenet. Therefore, the Court need not – and should not – conduct trial-like proceedings to make its own, independent factual findings. That there may be facts in dispute is not necessarily material to the Court's analysis. The Court must uphold the Secretary's certification if the Secretary's conclusions flow rationally from the facts as the Secretary found them at the time she reached her conclusions. *See Donovan v. Local 998, Amalgamated Transit Union*, 570 F. Supp. 716, 721 (D. Wis. 1983). As in other contexts of the judicial review of an administrative decision, the Court here is not to substitute its own judgment and findings – to act as an election supervisor – in place of the Secretary's. *See Id.*

[8] Examining the evidence that the Secretary provides here is simply following the Supreme Court's suggestion in *Bachowski* that reviewing courts may ask the Secretary to provide additional information to support her decision.

[9] *See, for example, Brock v. Weside Local 174, Int'l Union, United Automobile,* 643 F.Supp. 602, 603 (E.D. Mich. 1986) (the court, after holding an evidentiary hearing in accordance with Sixth Circuit's requirement for permitting intervention, nevertheless applied the arbitrary and capricious scope of review).

III. ARGUMENT

To prevail, the Secretary need only show that the reasons she provided in the Fox Declaration were not arbitrary or capricious and that there was a rational and defensible basis for the those factual findings. *Teamsters Local 639*, 543 F.2d at 378; *Amalgamated Transit Union Local 998,* 570 F.Supp. at 721; *Washington Teachers Union, Local 6*, 747 F.2d at 717.

Should this Court expand its review to include documents other than the Fox Declaration, the Secretary has provided documentation that aided her in reaching her decision in that declaration.

A. The Johnson slate's use of the union logo – although a violation of the union's election rules – did not have an effect on the outcome of the election.

The Secretary determined that the use of the union logo by the Johnson campaign, on its website and campaign posters, constituted a violation of the Election Rules, which prohibited candidates from using the union logo in campaign material.[10] *Fox Decl. Exh. 2.* Section 401(e) of the LMRDA, 29 U.S.C. § 481(e), requires that union elections be conducted in accordance with the constitution and bylaws of the union. The Election Rules incorporated Article X, section 1 of the Local 234 Bylaws and prohibited the use of the union letterhead and logo on campaign literature. *Election Rules, Exh. 7.* The Department considers the violation of a mandatory election rule, derived from the union constitution, to be a violation of Section 401(e). Nevertheless, the Secretary found that the evidence did not support a finding that these violations may have affected the outcome of the election, as is required to overturn an election. 29 U.S.C. § 482(c)(2).

[10] The issue of the use of the union logo on campaign handouts was not raised in Intervenors' post-election protest, nor was it raised verbally at any time during the supervised election.

1. The use of the union logo does not carry with it a presumption that it affected the election.

The intervenors first insist that the Johnson campaign's use of the campaign logo violated section 401(g) of the LMRDA, 29 U.S.C. § 481(g), which prohibits "moneys" of a labor organization to be "applied *to promote* the candidacy of any person." (emphasis added) *Br. at 8-10.* While the intervenors are correct that the use of a union logo to campaign may, in some circumstances, constitute a violation of section 401(g), *see McLaughlin v. American Federation of Musicians of the United States and Canada*, 700 F.Supp. 726, 735-36 (S.D.N.Y. 1988), they have ignored the corollary holding of that authority that "[t]he use of a union logo, by itself, on campaign literature need not inevitably violate section 401(g)." In particular, they have ignored the critical issue of "whether the use of the logos promoted the candidacy of" an individual, as required by the very terms of § 401(g) itself. 700 F.Supp. at 436.

Here, the Department determined that "a member who saw Johnson's webpage would have been unlikely to conclude that the picture constituted an endorsement of Johnson's candidacy" (and, at any event, the display of posters containing the logo was "visible for a very brief period of time"). *Fox Decl. at 12-13, Exh. 2*. Any examination of the campaign material would make clear that it was neither arbitrary nor capricious to conclude that the use of the union logo did not promote Johnson's candidacy. The logo is in the background of a prominent picture of Johnson; there are no words of endorsement; and the material is clearly campaign material. *Poster photograph, Exh. 26*. Given the context in which the logo was used, it is rational to conclude that such use was innocuous at worst. It is akin to a candidate for public office posing in front of the American flag. No one seeing such a picture would believe that the use of the flag means that the United States itself endorsed the candidate, just as no one seeing Johnson's campaign material would believe that the union logo means that the union was endorsing

Johnson. As such, it is rational for the Department to conclude that there was not any violation of Section 401(g).

Because the use of the union's logo was not a § 401(g) violation, there is no prima facie proof that the use of the logo affected the outcome of the election. The intervenors cite to a number of cases holding that, upon a showing of a § 401(g) violation, there is a presumption that the violation affected the outcome of the election. *Br. at 10-11.* In such a circumstance, the intervenors go on, the Secretary must put forth evidence to rebut that presumption. Those cases do not apply here. The Secretary rationally found a violation of § 401(e) (not § 401(g)), because the use of the logo violated the union's rules. No presumption applies to a § 401(e) violation, in part because such a violation is less serious than a § 401(g) violation. At all events, the intervenors misstate the law. In an election supervised by the Secretary, no violation of section 401 makes out a prima facie case of probable impact on the outcome of an election. *Teamsters Local 639*, 543 F.2d at 379-80. Such a rule only applies to violations not susceptible of quantification, which are committed in the course of an unsupervised election. *Id.* Here, however, the Secretary's supervision of the rerun election establishes a presumption of fairness and regularity that is not upset by the challenger's showing. *Id. at 380.*

2. <u>In fact, the use of the union logo did not affect the election's outcome.</u>

The Secretary provided more than sufficient explanation of the rational basis for her conclusion that the use of the union logo did not affect the election's outcome. Because the use of the union's logo did not promote Johnson, its use would not sway any union members to vote for Johnson. What is more, the Election Supervisor acted swiftly to respond to instances in which she learned of the logo's use. She required Johnson to take it off of his campaign web site

and directed her staff to cover the logo on campaign posters at polling sites.[11] Such actions mitigated any effect the use of the logo may have had, leading the Secretary rationally to bolster her conclusion that the use of the union logo did not have an effect on the ultimate outcome of the election.

The intervenors' assertion that the Johnson slate received many of its votes from the locations where the improper campaign material was posted in no way establishes that these votes were affected by that campaign material. The intervenors' insistence that the use of the logo on the posters displayed at specific stations affected the outcome of the election is mere speculation. *See Int'l Org. of Masters Mates, and Pilots,* 786 F.Supp. at 1237 (movant's assumption that an improper mailing convinced members not to vote was too speculative, where no evidence in support of claim existed and in light of the Secretary's judgment that the results were not affected.). That the Johnson slate won large majorities in locations at which the improper campaign material appeared does not necessarily mean that the one was caused by the other. The intervenors' inference that there was a causal link between the two – without any evidence of record to establish that any voter cast his or her vote because of the material at issue – is no more rational a conclusion than the Secretary's view that the use of the logo would not lead anyone to vote any particular way. Put another way, the intervenors' speculation does not meet the heavy burden of proof necessary to show that the Secretary's decision was arbitrary or capricious. *Local 998, Amal. Transit Union,* 570 F.Supp. at 719. Moreover, the intervernors' speculation is vitiated by the election results, which showed similar clear victories for the insurgent slate at polling sites where no logo was displayed. *Election Results, Exh. 18.*

Finally, heed must be paid to the character of the violation at issue before ordering a second, supervised election. *Teamsters Local 299,* 515 F.Supp. at 1283 (the character of a

[11] See numerous memoranda to file authored by Election Supervisor, *Exhs. 9-13.*

violation found to have existed in a supervised election must be taken into consideration, so that a *de minimus* violation with doubtful effect should not lead to a second supervised election). Here, the only violations found by the Secretary were two violations of the union's prohibition of using its logo on campaign material, violations which were brought to the attention of the Election Supervisor and corrected at the time. There is no reason that Local 234 should be put through the expense and uncertainly of a new election on this basis. *Teamsters Local 299*, 515 F.Supp. at 1283 (repeated challenges to election may affect the ability of the officers to discharge their duties and deplete union funds).

The Secretary provided the grounds for her decision in the Fox Declaration. *Fox Decl. Exh. 2*. Her decision in finding that the violations may not have affected the outcome of the election is neither arbitrary nor capricious.

B. The Secretary provided a rational reason for waiving the continuous good standing rule and for not re-opening nominations for office.

Section 402(c) of the LMRDA, 29 U.S.C. § 482(c), provides in relevant part that an election conducted under the supervision of the Secretary shall be held "so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization." By its terms, this statutory standard provides the Secretary with the discretion to disregard the union's constitution where following it would not be "practicable." *UAW Local 551*, 486 F.2d at 8 (Secretary's decision to postpone election due to fear of low turnout, despite union constitution setting forth timetable for election, was within his discretion and worthy of deference); *Herman v. Local 1695, United Auto.*, 111 F.Supp.2d 602, 609 (E.D. PA. 2000) (Secretary has discretion to re-open nominations to facilitate election, contrary to nomination procedure set forth in union constitution).

Here, Article VI, section 1 of the Local 234 Bylaws provides that in order to be a candidate for office, a member must have been in continuous good standing for 12 months preceding his nomination. *Election Rules, Exh. 7; Local Bylaws, Exh. 19.* In other words, to be eligible to be a candidate for office, a union member had to have paid his or her union dues, or had to have fallen within an enumerated exception to the dues requirement.[12] As the intervenors point out, a qualification requirement of this type is generally permissible. The Department would ordinarily enforce this requirement in a supervised election.

As the Fox Declaration explains, during the course of the rerun election, the Election Supervisor attempted to obtain the information necessary to enforce the continuous good standing requirement. She ultimately determined that sufficient information was not available, that it was therefore not practicable to enforce this requirement, and that the rule must be waived in order to conclude the election by the stated date. *Memo: Eligibility Rules, Exh. 13; Fox Decl. at 7.*

The intervenors raise two issues with respect to the decision to waive the continuous good standing rule. First, the intervenors argue that, as a factual matter, the Election Supervisor had the records necessary to enforce the rule. Second, the intervenors argue that, even assuming it was proper to waive the rule, the Election Supervisor's failure to re-open nominations for office prejudiced the intervenors, who had hoped to enlist certain union members – eligible to run because of the waiver of the rule – to join their slate.

[12] Article XVII § 4(a) of the International Constitution provides in relevant part: "Any member who is prevented by illness, injury, or lay-off from earning any wages in a calendar month shall be excused from paying dues for such month and such nonpayment shall not affect his good standing . . . . In order to be excused, such member shall be required to file with his/her Local Financial-Secretary-Treasurer a request for exoneration …" *TWU Const., Exh.20*

1. The records necessary to establish union members' standing were unreliable.

The Elections Supervisor's decision to waive the good standing rule was rational. Piecing together the information necessary to determine who was – and who was not – a member of the union in continuous good standing was impracticable. The union itself did not maintain records indicating which of its members was in good standing. *See Br. at 15-16; Report of Interview Joseph Coccio, Exh.* 21. The employer records, which indicated when an employee did not receive a pay check, did not indicate whether the employee nonetheless paid his or her union dues, even if he or she could not deduct the dues from a pay check. *SEPTA no earnings record, Exh. 14*. The employer records also indicated why an employee was not receiving a pay check, but the reasons enumerated on the employer records do not necessarily match up with the conditions for which the union excuses the payment of dues to maintain continuous good standing. *SEPTA leave record, Exh. 15.* (For example, a notation of "EMERGENCY AT HOME" does not answer the question of whether the emergency would fall within one of the enumerated exemptions of injury or illness.) The Election Supervisor found it impracticable, given the lack of reliable records from the union and SEPTA, to determine with any certainty who missed dues payments, why, and whether doing so could be excused. *Memo: Eligibility Rules, Exh. 13; SEPTA leave record, Exh.15; SEPTA no earnings record, Exh. 14.* With the election approaching, the Election Supervisor chose to waive the rule. *Report of Interview Joseph Coccio, Exh. 21; Memo: Eligibility Rules, Exh. 13.* That decision was neither arbitrary nor capricious. In fact, both during the election and after, Brown himself agreed that waiving the rule made sense. *See Fox Declaration, Exh. 2; Report of Interview of Willie Brown, Exh. 22.*

2. There was no reason for the Secretary to re-opening nominations.

There was nothing arbitrary or capricious about the Election Supervisor's not re-opening the nominations. To begin, no one asked her to do so. The Election Supervisor notified all candidates by letter, mailed on August 19, 2010, concerning the clarification of eligibility rules. *Memo: Eligibility Rules, Exh. 13.* No one contacted the Election Supervisor to demand that nominations be re-opened. It is hard to see how the Election Supervisor acted arbitrarily or capriciously in not doing something that nobody requested her to do.

Moreover, re-opening the nomination process, given the timing, would not have been practicable. The Election Supervisor finally waived the rule on August 19, a little more than one month ahead of the September 24 election. Re-opening nominations would have required – at a minimum – notifying the entire union membership of the waived rule, convening another meeting at which potential candidates were advised of the election rules, allowing potential candidates an opportunity to gather the requisite signatures on the nominating petitions, gathering those signatures, verifying that the signatures are proper, sending letters to the nominees asking them to accept the nominations, and returning those letters. *Article VI, Local Bylaws, Exh. 19.* Given all that had to be done and the little time to do it, it was to rational to not re-open the nominations.

Finally, the intervenors' claim does not hold up to the facts. The intervenors complained, in their post-election protest, that waiving the good standing rule without re-opening the nomination process deprived them of the opportunity to include influential candidates on their slate.[13] *Protest, Exh. 1; Br. 18-19; Report of Interview Willie Brown, Exh. 22.* During the

[13] The intervenors' claim here is different from the intervenors' post-election protest. The intervenors now protest that failing to re-open the nominations process deprived union members – as a general matter – of the opportunity to run for office. They are complaining that the harm was not limited to their slate, but to the membership generally. This protest is fundamentally different from the protest that the intervenors made post-election. It is, in other words,

investigation of the protest, the intervenors identified three persons – Avignon Dent, Irvin Turner, and Angelina Banks – whom the intervenors wished to have on their slate.

The Department of Labor interviewed all three, none of whom stated that the waiver of the good standing rules had any effect on his or her ability or desire to run on the intervenors' slate. Dent stated that Brown asked her to be on his slate, but she refused; she wanted to run on her own. *Report of Interview Dent, Exh. 23.* In her statement, she makes no mention of her considering a run with Brown. *Report of Interview Dent, Exh. 23.* And, Dent may have been able to run on her own, regardless of the injury that kept her out of work. Although Dent had missed a month of work in May 2010, she still could have qualified under the continuous good standing rules, had she followed the rules in the International Constitution. All she had to do was file with her local financial secretary-treasurer a request for exoneration in order to maintain her continuous good standing. There is no evidence that the Election Supervisor (or anyone else) interfered in any way with Dent's right to file for an exoneration or her right to be a candidate. It is therefore rational to conclude that not re-opening the nominations process did not deprive Dent of an opportunity to run, either with Brown or on her own.

Turner, in his interview and his signed statement, told the Department of Labor that Brown approached him in December 2009 about running. *Report of Interview, Irvin Turner, Exh. 24.* But Brown did not follow up, and neither did Turner because he had too many other things going on. *Report of Interview, Irvin Turner, Exh. 24.* In any event, Turner believed that he was a member in good standing and stated that, if Brown had called, he would have

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a new protest. As a matter of law, the intervenors cannot now make a claim that they did not make in their original protest. The time for submitting a protest to the September 24, 2010 supervised election expired on October 4, 2010. *Election Rules, p. ¶ 21, p. 10.* The Court should therefore not entertain the intervenors' new challenge. Successive rounds of election challenges undermines the "congressional objectives not to permit individuals to block or delay resolution of post-election disputes, but rather to settle as quickly as practicable the cloud on the incumbents' title to office; and to protect unions from frivolous litigation and unnecessary interference with their elections." *Bachowski*, 421 U.S. at 573 (internal quotation marks omitted).

considered running. *Report of Interview, Irvin Turner, Exh. 24.* Brown did not call. *Report of Interview, Irvin Turner, Exh. 24.* Again, it is rational to conclude that not re-opening the nominations process did not deprive Turner of an opportunity to run, either with Brown or on his own.

When Banks spoke to the Department of Labor on October 29, 2010, she stated that Brown never asked her to run. *Memo: Contact Attempts, Exh. 25.* And, though given the opportunity to do so, Banks never told the Department of Labor that she was interested in running at all. There is nothing to suggest, then, that not re-opening the nominations process deprived Banks of anything.

That Dent and Turner now submit signed affidavits to support the intervenors' brief in this action is factually and legally irrelevant. Those affidavits include statements that are different from – and at odds with – the statements that Dent and Turner made to the Department of Labor at the time of the investigation. These new statements cannot, as a matter of simple logic, undermine the rationality of the Secretary's conclusion that there is no violation here. The Secretary made a determination based on what Dent and Turner told the Department of Labor at the time of the investigation. She could not base a decision on facts not disclosed to her – or made up later. Beyond logic and common sense, as a matter of law, the Court must review the Election Supervisor's action on the basis of the facts available to her at the time when her decision was made. *Amalgamated Transit Union Local 998,* 570 F.Supp. at 720 (court evaluated the reasonableness of Secretary's decision to use coin flip to resolve a tie, at the time the facts were available to the Secretary when his decision was made). The Secretary's decision to waive the continuous good standing rule and not to re-open nominations was neither arbitrary nor capricious.

C. The Secretary provided a rational basis for denying the incumbent's request for robocalls.

The intervenors claim that the Election Supervisor violated the Act when she denied their request, made two days prior to the election, to make automated campaign phone calls ("robocalls") to members, using the union's list of members' phone numbers. In support of their claim, the intervenors rely on Section 401(c) of the LMRDA, 29 U.S.C. § 481(c), which provides, in relevant part, that:

> [e]very . . . local labor organization and its officers, shall be under a duty . . .to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members. . . .

The intervenors' claim of an absolute statutory right to make robocalls is in no way supported by this provision, which provides an obligation of the union to distribute "campaign literature." Robocalls are not "literature." What is more, the Department of Labor has never interpreted § 481(c) to require unions to allow candidates to use union phone lists for campaign purposes. The Secretary is not aware of any court that has interpreted § 481(c) in such a manner, and the intervenors have not pointed to any court that has done so.

That said, it would be permissible for a union to grant access to its list of members' phone numbers for the purpose of making robocalls, so long as all candidates had an equal opportunity to make use of the lists for this purpose. See 29 U.S.C. § 481(c) (stating that unions must "refrain from discrimination in favor of or against any candidate with respect to the use of lists of members").

As the Fox Declaration makes clear, the Election Supervisor properly applied these statutory principles to the intervenors' request for a list of members' phone numbers. The

intervenors made the request at the eleventh hour, a mere two days before the election. The Supervisor determined that there was not sufficient time to ensure that all candidates would have equal opportunity to use the members' telephone numbers. *Fox Decl. at 5, Exh. 2.* It is hard to see how that determination was arbitrary or capricious, given all that would go into making a robocall. First, there would need to be time for the Election Supervisor to notify all candidates, not just the intervenors' slate, of the right to obtain union members' telephone numbers. Then, there would need to be time for all the candidates to prepare a script for recording, to make the recording, and then to distribute it. The intervenors state – with nothing more than their own say so to back them up – that two days was plenty of time for other candidates to do all that was needed to make a robocall. That conclusory statement, by itself, does nothing to undermine the rational conclusion that other candidates would be unable to make a robocall on such short notice. The Election Supervisor's decision was eminently reasonable, and certainly cannot be deemed irrational or arbitrary. *See UAW Local 551,* 486 F.2d at 8.

D. The Secretary provided a rational reason for concluding that SEPTA did not treat any candidate or slate unfairly.

The intervenors allege that employer resources were used to support the insurgent slate of candidates, in the form of leave granted to employees to campaign, in violation of § 401(g) of the Act. 29 U.S.C. § 481(g). At bottom, the intervenors' legal argument here rests on the factual assertion that SEPTA provided leave to three Johnson supporters without providing similar leave to Brown supporters in violation of SEPTA's own staffing policies.

The Secretary's conclusion that there was no violation with respect to leave is rational. First, none of the intervenors' supporters were denied leave; none asked for leave for election day. The intervenors' own brief makes that clear. *See Brief at 23*. Next, SEPTA management

informed the Secretary that the "strictly enforced" quota policy – as the intervenors would have it -- was neither strictly enforced nor a policy. [14] The work site in question had an unwritten practice of granting leave to no more than ten employees per day. But SEPTA management routinely went above that quota – some 56 times in the ten months leading up to the election – as confirmed by management's records. *Report of Interview John Carson, Exh. 16, pp. 2-3.* Finally, SEPTA management further told the Secretary that, in the several years leading up to the election, it has been management's practice to grant leave to anyone who asked. In short, if Brown's supporters had asked for leave, they would have gotten it. SEPTA did nothing to treat one slate more favorably than another. The intervenors have provided no basis to conclude that the Secretary's findings are in any way suspect, let alone arbitrary and capricious.

IV. CONCLUSION

In sum, the conduct of elections is not a game or sport. Union elections are expensive and disruptive of the union's business. It is in the interest of the membership of the union and union democracy to provide finality to the election process and not to compel further elections after an election supervised by the Secretary, unless it can be shown that the conduct is grievous and may have affected the outcome of the election. *Teamsters Local 299*, 515 F.Supp. at 1282. Where disappointed losing candidates wish to object to actions taken by Secretary in her supervisory capacity, they assume a heavy burden of persuasion and proof to show that the Secretary's actions were arbitrary, capricious or otherwise not in accordance with the law. *Amalgamated Transit Union, Local 998,* 570 F.Supp. at 719. Intervenors have manifestly failed to make such a showing.

[14] *Report of Interview John Carson, Exh. 16.*

For the above-stated reasons, the Plaintiff respectfully requests that the Court grant judgment in the Secretary's favor and declare those elected in her Certification to be officers of Local 234.

Respectfully submitted,

ZANE DAVID MEMEGER
United States Attorney

/Margaret L. Hutchinson/ 4/18
MARGARET L. HUTCHINSON
Assistant United States Attorney
Chief, Civil Division

MICHAEL S. BLUME
Assistant United States Attorney

United States Department of Labor

Clinton Wolcott
Counsel for Advice

Shireen M. McQuade
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2011, the foregoing Plaintiff's Motion for Summary Judgment and Memorandum of Law has been filed electronically and is available for viewing and downloading from the ECF system. I further certify that I caused a true and correct copy of same to be served upon the following counsel via electronic mail:

Bruce Bodner, Esquire
Kaufman, Coren & Ress, P.C.
1717 Arch Street, Suite 3710
Philadelphia, PA 19103
BBodner@kcr-law.com

Claiborne S. Newlin, Esquire
Meranze and Katz, P.C.
The North American Building
Thirteenth Floor
121 South Broad Street
Philadelphia, PA 19107
cnewlin@meranzekatz.com

Michael S. Blume
Assistant United States Attorney

Dated: 4/27/11