



Issue date: 30Oct2001

In the Matter of

Albert Schmidt,
Complainant

v.

National Federation of Federal Employees,
Respondent

and

Chief, Division of Enforcement, Office of
Labor-Management Standards Administration,
(DOL)
Party-in-Interest

Case No.: 2001-SOC-00002

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This matter is before me as a result of a complaint filed by the Complainant alleging violations by the Respondent of the Bill of Rights of Title I of the Labor Management Reporting and Disclosure Act (LMRDA). The provisions of this act are applicable to the Respondent, a union representing employees of the federal government, under the Civil Service Reform Act of 1978, 5 U.S.C. § 7120, 29 C.F.R. § 458.2. In applying the standards set out in 29 C.F.R. Part 458, I am guided by the interpretations and policies followed by the Department of Labor in applying the provisions of the LMRDA and by applicable court decisions.

PROCEDURAL HISTORY

On December 20, 2000, this matter was referred by the District Director pursuant to 29 C.F.R. § 458.60, after Assistant Secretary Bernard E. Anderson upheld an appeal by the Claimant of the Director's dismissal of the complaint he filed under the Standards of Conduct, Bill of Rights of Members of Labor Organizations, 29 C.F.R. § 458.2. The Claimant filed his complaint with the Office of Labor Management Standards (OLMS) on December 23, 1999; on June 23, 2000, Mr. Michael Cahir, District

Director, notified the Claimant that he had determined that no legal action was warranted, and he was closing the file. On July 10, 2000, the Claimant appealed this dismissal to the Acting Assistant Secretary of Labor. On December 8, 2000, Assistant Secretary Anderson notified the Claimant that he was returning the matter to the District Director to refer the complaint to the Chief Administrative Law Judge for a hearing.

The matter was docketed in this office on January 31, 2001. On February 15, 2001, I notified the parties of my intent to hold a hearing. The parties subsequently engaged in discovery, pursuant to my March 2, 2001 Order setting out prehearing procedures, as well as deadlines for filing dispositive motions. On June 22, 2001, the Complainant filed his Motion for Partial Summary Judgment. On August 8, 2001, the Respondent filed its Opposition to the Complainant's Motion; and on August 21, 2001, the Complainant filed his Reply.

On June 22, 2001, the Respondent filed its Motion to Dismiss, or in the Alternative, for Summary Judgment.¹ On August 7, 2001, the Complainant filed his Response, and on August 20, 2001, the Respondent filed its Reply.

On September 24, 2001, I conducted a telephone conference at which the parties presented oral arguments.²

I have considered all of the pleadings filed by the parties, as well as the attachments thereto, in making my determination. For purposes of this decision, the record consists of the following:

1. The exhibits transmitted by Assistant Secretary Bernard Anderson on December 20, 2000, numbered 1 through 18, with subparts;
2. The Complainant's Motion for Partial Summary Judgment and Supporting Brief, including:
 - A. Affidavit of Kurt C. Kobelt, with attachments labeled Exhibits 1 through 11;
 - B. Declaration of Albert Schmidt, with attachments labeled Exhibit 1 and 2;
3. The Opposition of National Federation of Federal Employees (NFFE) To Motion for Partial Summary Judgment, with attachments numbered Exhibit A through C;
4. The Complainant's Reply Brief to Respondent's Opposition To Complainant's Motion for Summary Judgment;

¹ On June 26, 2001, the Respondent filed a corrected Memorandum.

² References to the transcript of this proceeding are designated as "Tr."

- B. The Second Declaration of Albert Schmidt;
- 5. Respondent's Motion to Dismiss Or, in the Alternative, for Summary Judgment;
- 6. Respondent's Corrected Memorandum In Support of Motion of Respondent National Federation of Federal Employees to Dismiss, or, in the Alternative, for Summary Judgment, with attachments numbered as A through J;
- 7. Complainant's Brief in Response to Respondent's Motion for Summary Judgment;
- 8. Respondent's Reply Memorandum in Support of Respondent National Federation of Federal Employees' Motion to Dismiss or, in the Alternative, for Summary Judgment;
 - A. Declaration of Richard Brown, with attachments numbered as Exhibit A through C;
- 9. The Orders issued in this case:
 - A. Notice of Docketing issued January 31, 2001;
 - B. Order issued February 15, 2001;
 - C. Order Denying Complainant's Request for Discovery issued July 9, 2001;
 - D. Order Setting Motions Hearing issued September 7, 2001.
- 10. Letter dated June 20, 2001 from Donald K. Neely, Office of the Solicitor, to this Court;
- 11. The transcript of the September 25, 2001 motions hearing.

FINDINGS OF FACT

The following facts are not in dispute, and I hereby adopt them as my findings of fact. Before July 1999, NFFE was an independent national labor organization, and the parent body of several intermediate bodies and approximately 300 local unions. After several years of discussions about the possibility of affiliating with a larger union, on July 9, 1999, NFFE signed an affiliation agreement with the International Association of Machinists and Aerospace Workers (IAMAW). Under the terms of this agreement, NFFE became a subordinate district of the IAMAW, known as NFFE Federal District 1, IAMAW, AFL-CIO. The NFFE constitution authorized NFFE to affiliate with other labor organizations that represent federal employees, subject to ratification by the membership. This ratification could be obtained either by a majority vote of the delegates at the NFFE convention, or by a secret ballot vote conducted by the local unions, with each local union having the same number of votes as they would have delegate votes at a NFFE convention.

In early August 1999, NFFE's National Executive Committee decided to submit the affiliation agreement directly to the local unions for the purpose of conducting secret ballot votes among their members. NFFE sent packages to the local unions, instructing them to hold a secret ballot vote on the affiliation agreement, in accordance with Section 3.10 of the NFFE constitution. Included in the package were:

1. An August 6, 1999 cover letter from NFFE President Brown to the local union presidents, explaining the basis for the affiliation;
2. A copy of the July 9, 1999 affiliation agreement;
3. A copy of the NFFE constitution;
4. A copy of the IAMAW constitution;
5. A copy of a multi-page "Affiliation Bulletin" prepared by NFFE, in question and answer form, anticipating and answering 47 questions about the effect of the affiliation;
6. A letter of endorsement by NFFE President Brown and Secretary-Treasurer Ray, supporting the affiliation;
7. A legal opinion letter from counsel discussing the effect of the affiliation upon the certification of NFFE bargaining units;
8. A NFFE Affiliation Committee Report, with an analysis by which NFFE ultimately chose to enter into affiliation with IAMAW;
9. The July 24, 1999 minutes of the NFFE National Executive Council meeting where the Council approved the affiliation and authorized that it be submitted to the locals for a decision in accordance with the constitution;
10. Two IAMAW journals and a video tape; and
11. Instructions to the local unions on the procedure by which to conduct the affiliation vote, including an official tabulation report, ballot, and return ballot envelope.

The local unions were to return the official tabulation report, indicating the results of the secret ballot elections, by September 7.

Out of approximately 300 NFFE local unions, 187 returned official tabulation reports.³ The votes of 27 of these local unions were not counted, 9 because they were received late, and 18 because the local unions were not current in dues payments. Out of the 160 local unions remaining, 35, representing an aggregate of 86 votes, voted against affiliation. The remaining 125 local unions, representing an aggregate of 284 votes, or 80% of the total votes, voted in favor of the affiliation agreement.

On November 1, 1999, NFFE signed an addendum to the affiliation agreement, which confirmed the completion of the affiliation ratification process. The addendum noted that the affiliation was intended to bring a previously unaffiliated union into the mainstream of the labor movement, and in order to ensure compliance with AFL-CIO requirements, the addendum adjusted the per capita obligations of NFFE, by accelerating the time from six years to four years in which NFFE would have to come into compliance with the per capita requirements of the IAMAW constitution.

Also on November 1, 1999, the Complainant filed internal charges with NFFE, alleging that:

1. No affiliation votes were permitted on other competing proposals;
2. Information on the affiliation proposal was not provided to the members;
3. The local unions were not notified whether they were current in their dues payments and thus eligible to vote; and
4. Mr. Ray [the NFFE Secretary-Treasurer] deprived the members of their voting rights by his actions in opening, counting, and tallying the “ballots.”⁴

The Complainant received no response to his complaint.⁵ On December 23, 1999, the Complainant filed a complaint with OLMS, incorporating his previous complaints, and adding additional allegations, to wit:

³ These numbers included the report from the Complainant’s local union, where he was the president, and was responsible for conducting the ballot and returning the results.

⁴ The Complainant has stubbornly continued to refer to the Tabulation Reports that Mr. Ray opened and recorded as “ballots.” In fact, the members cast their ballots at the local union level, where they were counted, and a tabulation report was prepared and sent to Mr. Ray. Mr. Ray simply opened these reports and recorded the results; he did not open or count any ballots.

⁵ According to Mr. Brown, the NFFE President, and Mr. Ray, they were unaware that the Complainant had filed a complaint.

1. No information about dissenting views was provided to the members; and
2. The November 1, 1999 addendum unlawfully increased members' dues without a vote.

Complainant's attorney also sent a letter to the Director, dated December 22, 1999, with two additional allegations, namely, that:

1. No information was provided to the members about the terms of employment by IAM of NFFE officers and staff; and
2. Opponents of affiliation were not provided with access to mailing lists.

On June 23, 2000, the District Director advised the Complainant that, after carefully reviewing the investigative findings, he had determined that legal action was not warranted, and he was closing the file. In the attached Statement of Reasons, the Director noted that the investigation did not substantiate the Complainant's allegation that NFFE had failed to provide meaningful information to the local unions in connection with the affiliation vote. The Director noted that NFFE provided a detailed package concerning the affiliation to every NFFE local president or contact person. Out of the 300 locals who were sent a package, 187 locals participated; the votes of eighteen of those locals were challenged, and ultimately were not counted; an additional nine locals' ballots were received late, and were not counted.

With respect to the Complainant's allegation of violations of standard election procedures by the National Secretary-Treasurer, Mr. Ray, the Director noted that the election process began in July, when Mr. Ray sent a letter and invoice to all local treasurers, informing them if they owed any money, and when that money had to be paid in full in order for the local union to participate in the affiliation vote. As the outside of the return ballot envelopes did not indicate who had returned the ballot, the envelopes were opened and it was determined if the local union was in arrears in dues, and therefore ineligible to vote, before the results were registered.⁶

On July 10, 2000, the Complainant, through his attorney, appealed the dismissal of his complaint. For the first time, the Complainant alleged that the members were not given the right to cast a secret ballot, in that the materials sent by NFFE did not instruct the local unions to conduct a secret ballot vote. Complainant also made an allegation that the members were provided inadequate information about the terms of the affiliation, although he did not specify how that information was inadequate. Also for the first time, the Complainant alleged that the members had insufficient time to review the affiliation proposal, and

⁶ The allegations concerning the dissemination of opposing views, and access by opponents to mailing lists, were dropped by the Complainant. It does not appear that there is any evidence that there were any opponents who asked for access to mailing lists, or dissenting views that were not disseminated.

that they were entitled to 60 days, not the 30 days that were provided. Finally, for the first time, the Complainant charged that opponents of affiliation were not permitted to use union resources or funds.⁷

In a pleading to the Assistant Secretary, dated August 31, 2000, the Complainant allowed that NFFE might have instructed the local unions to conduct secret ballot votes, but charged that the local unions “might not” have followed these instructions.

In the meantime, in August 2000, NFFE held a convention for the election of national officers. This convention was held pursuant to a settlement agreement entered into by the Complainant and NFFE in 1999 SOC 3. In that case, the Complainant, who was the incumbent national NFFE president, had lost the 1998 election for national president to Ray Brown by a narrow margin. The Complainant filed a complaint alleging that union funds were used to promote the candidacies of persons in the election. The Chief, Division of Enforcement, OLMS, found that violations had occurred, and ordered NFFE to rerun the election. NFFE was unwilling to do so, and the matter came before me for a hearing. Before the hearing could take place, however, the parties reached an agreement, which provided for a remedial election run under the supervision of the Chief, Division of Enforcement, OLMS.

At the August 2000 convention, as the first order of business, the NFFE delegates voted to approve bylaws that replaced NFFE’s constitution, and which immediately thereupon governed the conduct of NFFE as a subordinate district of IAMAW. At this convention, Complainant was again defeated for the office of national president by a narrow margin. The Complainant protested the election results, alleging numerous violations of Title IV. After investigation, the Chief, Division of Enforcement, OLMS, determined that there was no violation of Title IV during the supervised election which may have affected the outcome of the elections for President and Secretary-Treasurer. On January 12, 2001, the Chief certified the results of the election, and pursuant to the terms of the settlement agreement, on February 5, 2001, I issued a Recommended Decision and Order dismissing 1999 SOC 3. The Complainant filed exceptions to my Recommended Decision and Order,⁸ and in a decision issued on May 11, 2001, Assistant Secretary Joe N. Kennedy thoroughly reviewed the Complainant’s allegations, finding that they had no merit, and concluded that the Complainant did not show that my Recommended Decision and Order was arbitrary, capricious, or otherwise not in accordance with the law. The Assistant Secretary certified Richard N. Brown as President and Direct Business Representative, and Thomas Ray as Secretary-Treasurer.

⁷ This charge was subsequently dropped; it does not appear that there were any opponents of affiliation, much less any who asked to use union resources or funds.

⁸ The Complainant did this despite the fact that the settlement agreement specifically provided that “All decisions as to the interpretation or application of Title IV of the Act, relating to the supervised election and nominations, including any dispute regarding the legality or the practicability of any election procedure which arises during the course of the supervised election shall be decided by the Chief, Division of Enforcement, OLMS, whose decision shall be final.”

On December 8, 2000, Assistant Secretary Bernard Anderson responded to the Complainant's request for review of his December 23, 1999 complaint. The Assistant Secretary discussed the background of the complaint, as well as the various charges included in the Complainant's November 1, 1999 protest, his complaint to OLMS dated December 23, 1999, and his July 10, 2000 request for review. The Assistant Secretary concluded that there was a reasonable basis for the Complainant's allegation that 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. The Assistant Secretary noted, however, that he did not reach the merits of this allegation, that is, that NFFE was obligated to distribute all of the information to every member, or that there was a violation of the members' rights.

With regard to the remaining allegations made by the Complainant in his November 1, 1999 protest, the Assistant Secretary found that it was not clear if there was a reasonable factual basis for them, but that, since the administrative law judge would consider the allegations of inadequacy of information provided to the members, he or she would have the discretion to determine whether to consider the remaining allegations.

The Assistant Secretary then discussed the allegations that were made in connection with the December 23, 1999 complaint to OLMS, or in the July 10, 2000 request for review, which were not included in the Complainant's November 1, 1999 internal protest. The Assistant Secretary noted that there was an initial question as to whether these allegations were properly before the Department, as the regulations require that a member exhaust internal union remedies. Noting that ordinarily it would be appropriate either to affirm the dismissal of these allegations and require the Complainant to pursue internal union remedies, or to refer the allegations to the District Director to obtain additional information about whether the Complainant had to exhaust internal union remedies, the Assistant Secretary concluded that, inasmuch as he had found a reasonable basis for one of the Complainant's allegations, it would be appropriate to include all of them in the referral to the administrative law judge.

With respect to the Complainant's allegation that the November 1, 1999 addendum improperly raised members' dues, the Assistant Secretary questioned whether it was properly before the Department, as this alleged violation was not protested to the union. But the Assistant Secretary felt that the administrative law judge could also determine if the allegation could be considered, and found that there appeared to be a reasonable basis for this allegation.⁹

DISCUSSION

Standard for Summary Decision

⁹ The Assistant Secretary noted that there was no provision in the regulations for a review of the dismissal of the Complainant's complaint that NFFE officers violated their fiduciary duties in the conduct of the vote to ratify the affiliation agreement.

29 C.F.R. § 18.41(a) provides that when no genuine issue of material fact is raised, an administrative law judge may enter a decision to become final as provided by the statute or regulation under which the matter is to be heard. I find, based on the exhibits referred to the Office of Administrative Law Judges, as well as the parties' pleadings and attachments thereto, that no genuine issue of material fact has been raised. In addition, the parties have agreed that there are no factual issues to be developed at a hearing, and that it is appropriate for a decision to be made on the record (Tr. 78-80).

Issues Properly Before The Court

Under 29 C.F.R. § 458.60, a complainant is entitled to a hearing on allegations of violations of Title I when the District Director (or in this case, the Assistant Secretary) has made a finding of a reasonable basis for the complaint. Here, the Assistant Secretary specifically declined to find a reasonable basis for a number of the allegations made by the Complainant in his November 1, 1999 internal protest, his December 23, 1999 filing with OLMS, and his attorney's July 10 letter requesting review by the Assistant Secretary. Although the Assistant Secretary apparently felt that it was more efficient to transfer all of the issues raised by the Complainant to the Office of Administrative Law Judges for a hearing, regardless of whether there was a reasonable basis for them, in fact my authority to consider issues at a hearing is constrained by the regulation. Whether the Assistant Secretary thought that it was appropriate for me to consider these issues, as argued by the Complainant, is irrelevant. The regulations only provide me with the authority to consider those allegations for which there has been a determination of a reasonable basis.

In this case, there are only two allegations that meet this standard: the allegation that NFFE failed to provide information on the affiliation proposal directly to members (as opposed to local union officials) so as to enable them to cast an informed and meaningful vote, in violation of 29 C.F.R. § 458.2(a)(1); and the allegation that the November 1, 1999 addendum to the affiliation agreement improperly raised members' dues, in violation of 29 C.F.R. § 458.2(a)(3). Under 29 C.F.R. § 458.79, the Complainant has the burden of proving these alleged violations by a preponderance of the evidence.

Complainant's Allegation that NFFE Failed to Provide Information on the Affiliation Proposal Directly to Members

Title 29 C.F.R. § 458.2(a)(1) provides:

Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's

constitution and bylaws.¹⁰

The essence of the Complainant's argument is that NFFE had an obligation to provide the material in the affiliation packet directly to the members, and that by providing this material only to the local union officers, NFFE deprived the members of the right to cast an informed and meaningful vote.¹¹

The Supreme Court, in *Musicians Federation v. Wittstein*, 379 U.S. 171 (1964), noted that the "pervading premise" of both Title I and Title IV of the LMRDA "is that there should be full and active participation by the rank and file in the affairs of the union," and that union members are entitled under the LMRDA to the right of a meaningful vote. *Id.* at 182-183. In a case decided the same day, the Supreme Court stated that § 101(a)(1) is "no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote," and that even this right is "subject to reasonable rules and regulations" by the union. *Calhoon v. Harvey*, 379 U.S. 134, 138-139 (1964). This guarantee of equal rights that is embodied in the LMRDA is designed to ensure that the unions employ basic democratic processes, by prohibiting discrimination against classes of members in their rights to vote.

While the Ninth Circuit has found that in order to state a claim under § 101(a)(1), a union member must allege a denial of rights accorded to other members, *Ackley v. Western Conference of Teamsters*, 958 F.2d 1463 (9th Cir. 1992), other Circuit Courts have found that this statute requires that the right to vote on union matters be extended "on an equal basis and in a meaningful manner." *McGinnis v. Local Union 710, Int'l Bhd of Teamsters*, 774 F.2d 196, 199 (7th Cir. 1985), *cert. denied*, 475 U.S. 1121 (1986); *Bunz v. Moving Picture Mach. Operators' Protective Union Local 224*, 567 F.2d 1117 (D.C. Cir. 1977); *Blanchard v. Johnson*, 532 F.2d 1074 (6th Cir. 1976); *Trail v. International Bhd. of Teamsters*, 542 F.2d 961 (6th Cir. 1976); *Sheldon v. O'Callaghan*, 497 F.2d 1276 (2nd Cir), *cert. denied*, 419 U.S. 1090 (1974); *Sertic v. District Council of Carpenters*, 423

¹⁰ 29 C.F.R. § 458.2, Bill of rights of members of labor organizations, tracks the language in the LMRDA, 29 U.S.C. § 411 (Pub. L. 86-257, Title I, § 101).

¹¹ There is no allegation properly before me that challenges the adequacy of the information in the affiliation packet, as opposed to the propriety of providing it only to local union officers. For the first time in his Motion for Summary Judgment, the Complainant alleged that the members were "kept in the dark" about their dues structure under the proposed affiliation, and that the affiliation agreement was deficient in that it did not give members sufficient information on how their dues would be calculated. This particular allegation was never raised in any forum below, and clearly is not properly raised here. Similarly, as neither the Director nor the Assistant Secretary even discussed the allegation by Complainant's counsel, in his December 22, 1999 letter, that no information was provided to members about the terms of employment by IAM of NFFE officers and staff, I have no authority to consider this allegation.

F.2d 515 (6th Cir. 1970).

Under either standard, however, the Complainant's claim must fail. The Complainant has made no allegation of discrimination; that is, he has not alleged that some local unions were provided with information that others did not have. What he has alleged is that since the members did not individually receive the affiliation packet, they did not have a meaningful right to vote. In *Ackley, supra*, the Court discussed the necessity to tailor ratification procedures, in the context of contract ratification, to the characteristics and needs of each union. The Court noted that:

Some unions span large geographic areas, while others are purely local in nature. The members of some unions work at fixed locations; in other unions, members spend a considerable amount of their working time on the road or in the air. As a result of these and other differences, some groups of union members may prefer that the union hold ratification meetings, while others may opt for a mail balloting procedure. Neither of these procedures is ideal. Mail balloting may impede full debate on important issues, while an open meeting procedure may preclude the type of review of the entire contract that might otherwise be desirable. **The individual unions are better suited than the courts to the task of determining what is best for their members—when and under what circumstances ratification votes are appropriate and what procedures are best suited to their members' needs and work schedules.**

Ackley, supra, at 21 (emphasis added).

Courts have repeatedly recognized the need to exercise reluctance to interfere in internal union affairs. *Sheldon, supra*; *Allen v. International Alliance of Theatrical Employees*, 338 F.2d 309, 317 (5th Cir. 1964); *Blanchard, supra*, and have held that unions should be free to conduct their own elections as far as possible, unless certain basic democratic principles as embodied in § 401 of the LMRDA are infringed. *Cefalo v. Moffett*, 449 F.2d 1193, 1200 (D.C.C.A. 1971).

In *NLRB v. Financial Institution Employees of America, Local 1182*, 475 U.S. 192 (1986) (“*Seafirst*”), the Supreme Court, in discussing the legislative history of the Labor Management Relations Act, noted that Congress expressly declined to prescribe procedures for union decisionmaking in matters such as affiliation, and was “guided by the general principle that unions should be left free to ‘operate their own affairs, as far as possible.’ It believed that only essential standards should be imposed by legislation.” *Id.* at 203, fn. 11, citing *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982).

Here, under its constitution, NFFE had two options available for conducting an affiliation ratification: approval by the local unions voting by referendum, or approval by elected delegates voting at a convention. NFFE chose to submit the issue to the local unions for approval, and assembled a comprehensive package of materials that were sent to all local union officers, with instructions to conduct a secret ballot referendum vote among the members. There 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.¹²

The cases cited by the Complainant are not on point, and involved specific fact situations that are not presented here. Thus, there is no evidence that NFFE suppressed dissident views on affiliation or denied opponents the opportunity to provide information to members; there is no allegation that non-English speaking union members were discriminated against by providing materials printed in English; there is no allegation that union officers failed to fully inform members of alternatives to affiliation; there is no evidence that the information provided by NFFE was misleading or deliberately distorted; and there is no evidence that NFFE violated its own constitution in conducting the referendum vote. The sole basis for the Complainant's complaint is that the members were deprived of a meaningful vote because the affiliation package was not sent individually to each member. The Complainant has cited no case law setting out such a requirement, which is not surprising, given the admonition of the Supreme Court that courts should be reluctant to interfere in internal union affairs, *Calhoon, supra*, and the recognition that the LMRDA should be applied realistically, with due regard for the balance between the rights of union members and the need of elected union officials to carry out their duties without the "deliberative drag of tardily asserted challenges to their authority." *Brock v. IUOE*, 790 F.2d 508, 512 (6th Cir. 1986)

Here, the Respondent opted to seek the approval of its local unions through a membership referendum, an alternative that was available under its constitution, and it directed its officers to conduct a referendum vote on the affiliation proposal. As the Respondent has noted, there is no provision in the NFFE constitution for the submission of issues directly to members, as opposed to through the local unions. Nor has the Complainant shown that such a process is unreasonable. What the Complainant is essentially arguing is that the local union officers could not be trusted to make the information in the packet available to their members so that they could make a meaningful and informed decision on the affiliation vote.¹³ But there is no evidence to suggest that NFFE acted unreasonably in relying on its local

¹² Again, I stress that the Complainant's allegations that NFFE should have allowed the local unions 60 days to conduct the referendum vote, instead of 30; that there were irregularities in the process of opening and recording the tabulation sheets; that the members were not provided with information about terms of employment by IAMAW of NFFE officers and staff; that the local unions were not notified if they were current in dues payments and thus eligible to vote; and that the members were "kept in the dark" about their dues structure, are not properly before me, and I have not considered these allegations in making my determination.

¹³ In his Motion for Summary Judgment, the Complainant argues that "it is undisputed" that none of the information in the affiliation packet was ever provided to NFFE's membership, citing to the deposition of Mr. Ray. What Mr. Ray actually said was that NFFE did not provide this information directly to the members. There is not a shred of evidence to suggest that the local union officers did not share this information with their members in connection with the affiliation vote.

union officers to make the information available to members, and carry out the balloting.¹⁴

I find that the Complainant has not established a violation of 29 C.F.R. § 458.2(a)(1), as he has failed to allege, much less establish, that he was denied rights accorded to other union members in connection with the affiliation ratification; and he has not established that the decision by NFFE to provide information packets to the local union officers, as opposed to individual members, deprived the members of the opportunity for a meaningful vote on the affiliation proposal.

Finally, even if there were some merit to this allegation, the relief requested by the Complainant is problematic. The Complainant wants to undo the affiliation vote of over two years ago. Even assuming that it were practical to undo such a merger more than two years later, the ultimate result of such an action would be to nullify the officer elections that took place at the August 2000 convention. These elections were conducted under the supervision of the Department of Labor, under a Convention Call that took into account both the NFFE and IAMAW constitutions, as well as the adoption of new bylaws by convention delegates. To undo the affiliation is necessarily to undo the election that was based on that affiliation, regardless of the ultimate outcome of any new affiliation vote. The Complainant's claims that the unraveling of the affiliation could not conceivably undo the results of the previous Title IV action, and will only require a new election if a second vote is against affiliation, is disingenuous; of course a new election will be required, regardless of the outcome. I note that the Complainant, in his original complaint to OLMS, asked for an order suspending all measures taken pursuant to the referendum vote. Clearly, this would include the August 2000 officer election.

Unfortunately for the Complainant, he specifically agreed to be bound by the results of the August 2000 election, in the settlement agreement he entered into with the Respondent in connection with 1999 SOC 3. Moreover, a post-election remedy is only available under Title IV; it is not available for Title I claims. *Calhoon, supra*. The Complainant is essentially seeking a back-door route to a new election, a remedy that he is not entitled to under Title I, and that is specifically precluded to him under the terms of the settlement agreement that he signed.

Complainant's Allegation that the November 1, 1999 Addendum Unlawfully Increased Members' Dues Without a Vote

Title 29 C.F.R. § 458.2(a)(3) provides, in pertinent part:

Except in the case of a federation of national or international labor organizations, the rates of dues

¹⁴ Indeed, there is no evidence that anyone other than Complainant made any complaints about the referendum process. Complainant himself, as president of his local union, carried out the instructions in the packet, and made no complaint until well after the referendum was concluded, and the affiliation effectuated.

and initiation fees payable by members of any labor organization in effect on the date this section is published shall not be increased, and no general or special assessment shall be levied upon such members, except:

.....

In the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (A) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than 30 days written notice to the principal office of each local or constituent labor organization entitled to such notice, or (B) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (C) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization.

The Assistant Secretary found that there was a reasonable basis for the Complainant's allegation that the November 1, 1999 addendum improperly raised members' dues, but also noted that there was a question as to whether this allegation was properly before the Department, as the Complainant did not protest it to NFFE first. In this regard, the Complainant argues that he is excused from the requirement that he exhaust his internal union remedies on the grounds of futility: that is, when he received no response to his November 1, 1999 allegations, he could assume that NFFE was deliberately ignoring them, and he was not required to bring further allegations to NFFE.

Title 29 C.F.R. § 458.2(a)(4) provides that

No labor organization shall limit the right of any member to institute suit . . . Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a 4-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof.

This requirement of exhaustion of internal remedies is discretionary, and must be exercised in light of Congress's concern about preserving the right of union members to sue for violations of rights. *Johnson v. General Motors*, 641 F.2d 1075 (2nd Cir. 1981).

Courts have set out a number of exceptions to the requirement of exhaustion of internal remedies. Thus, exhaustion is not necessary if the union wrongfully refuses to process the employee's grievance, thus violating its duty of fair representation; the employer's conduct amounts to a repudiation of the remedial procedures specified in the contract; or exhaustion of internal remedies would be futile, either because of the absence of an available process, or because the union officials are so hostile to the worker that he could not hope to get a fair hearing. *Rabalais v. Dresser Industries, Inc.*, 566 F.2d 518 (5th Cir. 1978); *Winter v. Local Union No. 639*, 569 F.2d 146 (D.C.C.A. 1977). As the Second Circuit stated in *Johnson, supra*,

A court in deciding whether to apply the exhaustion doctrine must determine ‘whether the available procedures are adequate and reasonable in light of the facts of the particular case’ [citations omitted] . . . [and] must balance the right of union members to institute suite against the policy of judicial noninterference in union affairs. If intraunion remedies do not provide a reasonable and adequate opportunity for full relief, or if resort to them would be futile, exhaustion should not be required.

Id. at 1079.

In this case, the NFFE constitution provides a process for filing complaints, a process with which the Complainant, as a former NFFE President, and President of his local union, was familiar. The Complainant’s argument is essentially that, because he received no response to his November 1, 1999 complaint, he could assume that any attempts to file further complaints with NFFE would be futile. There is no evidence that NFFE wrongfully failed to process the Complainant’s November 1, 1999 complaint. The testimony of Mr. Ray and Mr. Brown suggests that the complaint was never received, and the Complainant has not alleged that NFFE refused to process it, as opposed to simply not responding to it.¹⁵ Indeed, the Complainant, himself a former NFFE president, was in a unique position to be acquainted with the procedures for processing a complaint. Yet there is no evidence that he ever followed up on his complaint, to ensure that it was in fact received, or to inquire about the status. Moreover, although he filed no protest when he, as local president, received the affiliation packet,¹⁶ and indeed waited almost three months to lodge a complaint with NFFE, alleging that “time was of the essence,”¹⁷ he waited less than two months after making his complaint to NFFE to file his claim with OLMS. While Complainant’s counsel may be correct that a union member does not have an affirmative duty to follow up on a complaint, and make sure that it is being processed, the circumstances here suggest that the Complainant was not really interested in an internal resolution of his complaint.

Of course, the Complainant’s claim that the addendum unlawfully increased members’ dues was not included in the November 1, 1999 complaint. But the Claimant relies on his claim that the process

¹⁵ In his “Second Declaration,” dated August 17, 2001, the Complainant stated that he sent his November 1, 1999 complaint by facsimile to NFFE president Brown, yet there is no documentation in the record to verify either the transmission or receipt of this document.

¹⁶ The Complainant’s recent recollection in his “Second Declaration,” that he asked Mr. Ray why the materials were not sent directly to the members, does not amount to a timely complaint about the conduct of the affiliation vote. Moreover, it is internally inconsistent: either Mr. Ray replied that a decision had been made not to send the materials to the membership and refused to alter these procedures, per paragraph two, or Mr. Ray stated that he would get back to the Complainant with an answer, but he never did so, per paragraph 10.

¹⁷ “Second Declaration of Albert Schmidt,” dated August 17, 2001.

was futile because those who would decide that claim were the same people against whom his complaint was made. Indeed, he stated his belief that Mr. Brown and Mr. Ray, strong advocates of affiliation, were hostile to him because he opposed the affiliation, and that Mr. Brown was also hostile because the Complainant had been his opponent in the election for national president. However, the Claimant has offered no concrete evidence of personal animus to support his bald allegation that there was hostility against him, nor can hostility, arbitrariness, or bad faith be inferred from any of the circumstances surrounding the grievance process. *Winter, supra*, at 149-150.

But even assuming that the facts supported a finding that the failure of NFFE to respond to the November 1, 1999 complaint established the futility of following internal union grievance procedures, the Complainant's complaint must fail. The Complainant's allegation rests on a misunderstanding of the per capita tax requirements, and a misreading of the November 1, 1999 addendum. Thus, under the NFFE constitution, the local unions pay a per capita tax to NFFE. The affiliation agreement sets out the amount of that per capita tax for the first five years, and notes that the per capita tax for the sixth year will be determined based on the IAMAW constitution. Under Article 4.3b of the NFFE constitution, members' dues are calculated by the local unions, using a formula that requires a minimum dues amount of per capita tax plus fifty cents per pay period. This formula did not change under the affiliation agreement, and was ratified by the delegates at the August 2000 convention. Article 4.5b of these bylaws sets out the current per capita amount of \$8.54 per pay period, and provides that "Any increase in Local Lodge Member per capita tax to NFFE FD 1 will be approved by the District Lodge Executive Council and then submitted to Local Lodges by referendum."

NFFE also pays a per capita tax to IAM, under the terms of the affiliation agreement. This per capita tax plays no role in the calculation of members' dues, but is an amount that NFFE pays directly to IAM. Indeed, as discussed above, NFFE cannot raise the local unions' per capita tax payments, or change the dues formula, without approval by the Executive Council and member referendum.

The November 1, 1999 addendum states:

Inasmuch as it is the intent of this affiliation to bring a previously unaffiliated union into the mainstream of the labor movement, it is reaffirmed and stated that NFFE Federal District 1, IAMAW shall come into compliance with the per capita requirements of the IAM Constitution no later than four (4) years from the date this affiliation was consummated and shall remain an affiliate of the IAM continuously thereafter.

By its clear terms, the language of this addendum refers to the per capita tax requirement from NFFE to IAM, not to the per capita tax requirement from the local unions to NFFE. This addendum did nothing to change the per capita tax requirements from local unions to NFFE as set out in the affiliation agreement. While the Complainant now argues that members may suffer from a trickle down effect, in that NFFE may turn to its members for more money if its obligations to IAMAW increase, the NFFE

constitution and bylaws specifically afford the members the right to vote on any such increases.¹⁸

Based on the above, I find that the Claimant has not established that the November 1, 1999 addendum improperly raised members' dues,¹⁹ and thus he has not met his burden of establishing a violation of 29 C.F.R. § 458.2(a)(3) by a preponderance of the evidence.

CONCLUSION

For the reasons discussed above, having found that the Complainant has not established a violation of 29 C.F.R. § 458.2(a)(1) or (3), I hereby recommend that the Complaint be **DISMISSED**.

In accordance with 29 C.F.R. Part 458.70, I hereby transmit this Recommended Decision and Order, along with the entire case file, to the Assistant Secretary of Labor for appropriate action.

SO ORDERED.

A
LINDA S. CHAPMAN
Administrative Law Judge

¹⁸ As I noted above, in this proceeding, for the first time, the Complainant now alleges that the affiliation agreement did not provide the members with adequate information about their dues structure under the proposed affiliation. As neither the Director nor the Assistant Secretary considered this allegation, much less found a reasonable basis for it, it is not properly before me, and I have no authority to consider it.

¹⁹ The Complainant's July 10, 2000 allegation that the material sent by NFFE did not instruct the local unions to conduct a secret ballot subsequently transformed into a claim that the local unions in fact did not conduct secret ballot votes. On July 9, 2001, I denied the Complainant's motion to compel discovery from NFFE, and to require NFFE to canvass all of the local unions about their voting procedure, on the grounds that this allegation had not been raised in either the November 1, 1999 or December 23, 1999 complaint, and that the local unions were not parties to this action. The Complainant subsequently dropped this allegation.

