



**Issue Date: 04 September 2013**

Case No.: 2013-SOC-00001

*In the Matter of*

**CHIEF, DIVISION OF ENFORCEMENT,  
OFFICE OF LABOR-MANAGEMENT STANDARDS,  
U.S. DEPARTMENT OF LABOR,**

*Complainant,*

v.

**LOCAL 12, AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES,**

*Respondent.*

**RECOMMENDED DECISION AND ORDER**  
**GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION**

This case arises under the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA”), as amended, 29 U.S.C. § 401 *et seq.*; the standards of conduct provisions of the Civil Service Reform Act of 1978 (“CSRA”), 5 U.S.C. § 7120; and the CSRA standards of conduct regulations issued at 29 C.F.R. Parts 457-459. Complainant Office of Labor-Management Standards (“OLMS” or “Complainant”), Division of Enforcement, U.S. Department of Labor seeks an order declaring void the February 29, 2012 election of the Local 12, American Federation of Government Employees (“Local 12” or “Respondent”).

**I. FINDINGS OF FACT**

The American Federation of Government Employees, Local 12, represents approximately 1,200 federal government employees – all of whom work for the U.S. Department of Labor. Complainant’s Motion for Summary Decision (“CMSD”) 4. This case revolves around the events up to and including Local 12’s regular election held on February 29, 2012 for several officer positions: President, Executive Vice President, Treasurer, Secretary, Chief Stewart, and Assistant Treasurer. *Ibid.* The election consisted of essentially three parties for each position: the Activists, Unifiers, and independent. *Ibid.* With the exception of Treasurer, most of the incumbent candidates were Activists. *Ibid.*

As part of its normal duties, Local 12 keeps a list of its members eligible to vote at the election. *Ibid.* This list contained each member’s name and address. *Ibid.* The list is mainly used to send out election notices. *Ibid.* But candidates may obtain this list for a fee in order to send out

campaign literature – more precisely, candidates pay the union for mailing labels for the union members, and then affix the mailing label to their campaign brochure. *Ibid.*

On February 10-14, 2012, Megan Guerriero (“Guerriero”), a Local 12 employee, printed a set of these mailing labels for the union itself in order to send out election notices. *Id.* at 4-5. She and another staff member then affixed the labels to the election notices and mailed them. *Id.* at 5.

On or about February 20, 2012, Eugenia Ordynsky (“Ordynsky”), the Unifiers’ candidate for President, purchased a set of these mailing labels in order to distribute the Unifiers’ campaign literature. *Ibid.* The mailing labels were derived from the same set that Guerriero used to send out the election notices. *Id.* at 6. On February 23, 2012, Ordynsky and other Unifiers met and affixed the labels to post cards promoting the candidacy of all of the Unifiers running in the officer election. *Ibid.*

Shortly after providing the mailing list to Ordynsky, Guerriero realized that the list she provided was defective after she received approximately 50 election notices that were returned as undeliverable. *Ibid.* She also received calls and emails informing her that the election notices were not being properly distributed. *Ibid.* Guerriero took a number of steps to remedy the problem and was able to obtain the correct addresses for most of the members that did not receive the election notice (this new list is hereinafter referred to as the “updated list”). *Ibid.* However, no one informed Ordynsky or the Unifiers of the problems with the old mailing list. *Id.* at 6-7.

Local 12 held its election on February 29, 2012. The Activists were elected to each of the officer positions, except Treasurer and Head Steward. *Id.* at 8. The margin of victory for each position is as follows:

- *President:* Activists won by 53 votes.
- *Executive Vice President:* Activists won by 59 votes.
- *Treasurer:* Unifiers won by 82 votes.<sup>1</sup>
- *Secretary:* Activists won by 3 votes.
- *Head Steward:* Independents won by 25 votes.
- *Assistant Treasurer:* Activists won by 4 votes.

*Ibid.*<sup>2</sup>

After the election, several union members told Peggy Kavanaugh (“Kavanaugh”), the successful Unifier candidate for Treasurer, that they did not receive her campaign post card. *Id.* at 7. Kavanaugh and Ordynsky therefore compared the mailing list they received with the updated list. *Ibid.* They discovered that they did not receive the correct addresses to a number of

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<sup>1</sup> I note that OLMS incorrectly states the margin of victory for Treasurer to be “182.” CMSD 8. However, the winner received 268 votes, and the loser received 186 votes. *Ibid.* Thus, the winner’s margin of victory is 82.

<sup>2</sup> OLMS recounted the election results during its investigation of this case and largely confirmed the vote totals, with minor discrepancies that do not affect the holding of this case.

members. *Ibid.* Although when or how is unclear from the record before me, this case was referred to OLMS for investigation.

OLMS conducted its own investigation into the faulty mailing list given to Ordynsky. Alison Dunn, OLMS investigator, compared the mailing list given to Ordynsky with a list showing who paid union dues for the period covering the election, as well as a list of retirees. *Id.* at Ex. 7, para. 11. She determined that “at least 273 members who were eligible to vote were not on the list” provided to Ordynsky. *Id.* at Ex. 7, para. 12. As all of the margins of victory in the election were below 273, OLMS determined that the faulty mailing list given to Ordynsky “may have affected” the election. It therefore instituted this case seeking to set aside the election results for President, Executive Vice President, Secretary, Head Steward, and Assistant Treasurer – but not Treasurer because the Unifiers won despite the faulty mailing sheet.

OLMS filed a complaint which was docketed with the Office of Administrative Law Judges (“OALJ”) on March 15, 2013. I was subsequently assigned to the case and I set the hearing to commence on September 11, 2013 in Washington, D.C.

On August 2, 2013, OLMS filed a Motion for Summary Decision. Respondent filed a brief in opposition to OLMS’s Motion for Summary Decision on August 9, 2013. On August 23, 2013, OLMS filed a request for leave to file a reply to Respondent’s opposition brief and reply in support of its Motion for Summary Decision.<sup>3</sup>

After reviewing the moving and reply papers, the evidence attached thereto, as well as the administrative record as a whole, I issue the following recommended order and decision.

## II. STANDARD OF REVIEW

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges provide that an Administrative Law Judge (“ALJ”) “may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 29 CFR § 18.40(d); *see also*, Fed. R. Civ. P. 56(c), incorporated by reference into the OALJ Rules of Practice and Procedure by 29 CFR § 18.1(a) (“The Rules of Civil Procedure of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.”).

No genuine issue of material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary decision has the burden of establishing the “absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The burden then shifts to the non-movant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

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<sup>3</sup> As Respondent has not opposed it, OLMS’s request for leave to file a reply in support of its Motion for Summary Decision is granted.

In reviewing a request for summary decision, I must view all of the evidence in the light most favorable to the non-moving party. *Darrah v. City of Oak Park*, 255 F.3d 301, 305 (6th Cir. 2001).

### **III. CONCLUSIONS OF LAW**

#### **A. LAW**

##### **1. Jurisdiction**

The CSRA, *inter alia*, accords recognition to federal employee “labor organizations” that abide by certain “standards of conduct.” *See* 29 U.S.C. § 7120. A labor organization is bound by the CSRA’s standards of conduct provisions if it is “composed in whole or in part of employees. . . ,” who are “employed in an [Executive] agency. . . .” *See* 29 U.S.C. § 7103(a)(2), (a)(3), and (a)(4); 29 U.S.C. § 7120(d).

The CSRA empowers the Assistant Secretary of Labor for Labor Management Relations to “prescribe such regulations as are necessary to carry out the purposes” of the standards of conduct provisions of the CSRA. 29 U.S.C. § 7120(d).

Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matters arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

*Ibid.*

The Department of Labor issued CSRA standards of conduct regulations regarding the election of officers at 29 C.F.R. § 458.29, as well as for the enforcement of these regulations at 29 C.F.R. Part 458, Subpart B. Section 458.50, 29 C.F.R., states that OLMS may investigate any possible violations of “any provision of §§ 458.26 through 458.30.” Thus, OLMS may conduct an investigation for any violation of the CSRA’s standards of conduct implementing regulations regarding the election of officers.

The OALJ has jurisdiction under the CSRA’s standards of conduct implementing regulations to hear cases of alleged federal employee labor union election violations brought by OLMS. Section 458.65, 29 C.F.R., requires OLMS to follow the procedures set forth in “§§ 458.66 through 458.92” if OLMS “concludes that there is probable cause to believe that a violation has occurred which may have affected the outcome” of an election. 29 C.F.R. § 458.65(a). If OLMS fails to reach an agreement with a person or labor organization over an alleged violation, then OLMS must “institute enforcement proceedings by filing a complaint with the Chief Administrative Law Judge, U.S. Department of Labor . . . .” 29 C.F.R. § 458.66(c). Section 458.70, 29 C.F.R., empowers the OALJ to hear enforcement proceedings:

Each enforcement proceedings pursuant to this part shall be conducted before an Administrative Law Judge designated by the Chief Administrative Law Judge for the Department of Labor . . . .

## **2. Violation of LMRDA**

As mentioned above, the CSRA itself does not define the standards of conduct for federal employee labor organizations. Rather, Congress delegated authority to the Labor Department to promulgate such regulations. *See* 29 U.S.C. § 7120(d). The Department of Labor's regulations were thus issued at 29 C.F.R. Part 458, and specifically mandate for officer elections that:

Every labor organization subject to the CSRA . . . shall conduct periodic elections of officers in a fair and democratic manner. All elections of officers shall be governed by the standards described in sections 401(a), (b), (c), (d), (e), (f), and (g) of the LMRDA to the extent that such standards are relevant to elections held pursuant to the provisions of 5 U.S.C. 7120 . . . .

29 C.F.R. § 458.29. Thus, the CSRA's standards for officer elections are found in the LMRDA and reflect Congress's intention that such standards "conform generally to the principles applied to labor organizations in the private sector." 5 U.S.C. § 7120(d).

LMRDA's standards for officer elections are located at Section 401, 29 U.S.C. § 481-484. Section 401(c) is specifically at issue in this case. Section 401(c), 29 U.S.C. 481(c), states that a labor organization:

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 one candidate with respect to the use of lists of members . . . .

29 U.S.C. § 481(c).

If the ALJ finds that by a preponderance of evidence that (1) a violation of § 481(c) occurred, and (2) the violation "may have affected the outcome" of the election, then the ALJ must prepare a recommended decision and order for the Assistant Secretary declaring the election void and directing the conduct of a new election. 29 C.F.R. §§ 458.65, 458.70, 458.79, 458.88(a); *see, e.g., In re: Local 916, Am. Fed'n of Gov't Employees, AFL-CIO*, ALJ No. 93-SOC-5, at 3 (ALJ Jan. 28, 1994).

## **B. ANALYSIS**

### **1. Jurisdiction**

Respondent claims in its first "affirmative defense" that the OALJ does not have jurisdiction to hear this case. Respondent contends that the Department of Labor "created,

supported, endorsed and coerced Local 12 bargaining unit employees to vote for the slate of candidates known as The Unifiers lead by Ms. Eugenia Ordynsky. . . .” Respondent’s Reply Brief (“RRB”) 3. And that “[t]his is an act of federal employer retaliation against an exclusive bargaining unit representative which is covered under 5 Chapter 71 [*sic*], and this matter should be removed to hearing [*sic*] before the Federal Labor Relations Authority.” *Ibid*.

Complainant agrees that Respondent may bring a *retaliation* claim against the Labor Department before the Federal Labor Relations Authority (“FLRA”) under 5 U.S.C. § 7116. CRB 7-8. But Complainant may still bring its officer election enforcement claim against Respondent before the OALJ under 5 U.S.C. § 7120. *Ibid*. Put simply, they are different claims, brought by different plaintiffs, heard in different forums.

Although it would be improper for me to opine on the jurisdiction of another tribunal, suffice it to say here that Complainant is correct that the OALJ is not the proper forum for Respondent’s “unfair labor practice” claim under the CSRA, 5 U.S.C. § 7116. But OALJ is the proper forum for Complainant’s standards of conduct claim under the CSRA, 5 U.S.C. § 7120. Respondent’s “affirmative defense” therefore has no merit.

Local 12 is a “labor organization” under the CSRA. A “labor organization” is composed “in whole or in part” of federal agency employees. *See* 29 U.S.C. § 7103(a)(2), (a)(3), and (a)(4). Local 12 is a labor union representing approximately 1,200 Labor Department employees in the Washington, D.C. area. CMSD 4. Therefore, Local 12 is bound by the standards of conduct regulations for officer elections under the CSRA and its implementing regulations. *See* 5 U.S.C. § 7120 (“Standards of conduct for *labor organizations*”) (emphasis added); 29 C.F.R. § 458.29 (“Every labor organization subject to the CSRA . . . shall conduct periodic elections of officers . . . All elections shall be governed by the standards prescribed in [LMRDA]. . . .”). Respondent does not dispute this fact and does not present any evidence to show otherwise.

OALJ has jurisdiction over Complainant’s claim against Local 12. OLMS concluded that there was probable cause Local 12 failed to follow the proper procedures for carrying out an officer election under CSRA’s regulations at 29 C.F.R. § 458.29 and LMRDA § 401(c), 29 U.S.C. § 481(c). *See* Complainant’s Complaint (“CC”) para. 17. So, it was required to file its case with the OALJ unless it reached a settlement beforehand. 29 C.F.R. § 458.66(c). Under the CSRA’s implementing regulations, this Office has jurisdiction to hear claims of officer election violations brought by OLMS against labor organizations. 29 C.F.R. §§ 458.66(c), 458.70. Respondent’s argument that this claim cannot be heard before the OALJ on jurisdiction grounds therefore is wholly incorrect.

## **2. Prejudice**

Respondent’s second “affirmative defense” is that OALJ “lacks jurisdiction in this case as Local 12 represents bargaining unit employees in that same office. Therefore, the Administrative Law Judge has an interest in the outcome of the election.” Respondent’s argument therefore is that the OALJ is biased or prejudicial in this case.

Respondent's second "affirmative defense" is again meritless. First, Respondent provides no statute, regulation, or case law in support of its argument. It provides no standard by which I am to judge its arguments. Respondent rather throws out a conclusory legal statement in its brief, and leaves me to research every possible construction Respondent could have meant. On that basis alone, I may deny Respondent's argument. *See Herbert v. Architect of Capitol*, 839 F.Supp.2d 284, 298 (D.C. Cir. 2012) (declining to consider plaintiff's unsupported legal and factual arguments in opposition to summary judgment).

Second, although some staff members of the OALJ headquarters in Washington, D.C. are members of Local 12, Respondent does not explain how it follows that either OALJ or I have an "interest in the outcome of the election." Indeed, it cannot. ALJs are not members of Local 12 and do not have any *personal* interest in the outcome of the Local 12's election. *See Levi v. Anheuser Busch Co., Inc.*, ARB Nos. 06-102, 07-020, 08-006, at 15 (ARB April 30, 2008) (finding ALJ did not err in failing to recuse himself because only personal bias, prejudice, or interest supports recusal) (internal citations omitted).

Third, I find that there are no grounds to recuse myself or the OALJ as a whole even if I apply the bases for recusal for federal judges to the case at hand. The Judicial Code, 28 U.S.C. § 455, provides the rules by which a federal judge is to disqualify him or herself. Grounds for recusal include, *inter alia*, "any proceedings in which [a judge's] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Thus:

. . . when applying § 455(a), courts must ask whether a reasonable and informed observer would question a judge's impartiality. . . . To deter unhappy litigants from abusing the recusal statute and to promote faith in the judicial system, courts have emphasized that a judge has as much an obligation not to recuse himself where there is no reason to do so as he does to recuse himself when proper. . . . Furthermore, because judges are presumed to be impartial, "the Court must begin its analysis of the allegations supporting . . . a request [for recusal] with a presumption against disqualification."

*S.E.C. v. Bilzerian*, 729 F.Supp.2d 19, 22 (D.D.C. 2010) (internal citations omitted). "To overcome this presumption, a party seeking recusal must 'show a true personal bias' on the part of the judge by alleging 'specific facts and not mere conclusions or generalities.'" *Ibid* (citing *Bd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 380 F.2d 570, 576-77 (D.C. Cir. 1967)).

Respondent has failed to overcome the presumption against recusal. It has merely alleged that there are employees in the OALJ who are members of Local 12. But it does not state how I have a personal bias or prejudice regarding Local 12. Respondent does not state whether or why I would have a bias or prejudice *against* Local 12 if employees within the OALJ are members. More specifically, Respondent does not state whether or why I would have a bias or prejudice against the *Activists* – a favoritism for the Unifiers ostensibly resulting in an unfavorable decision for the Activists in this case. Indeed, I and my fellow ALJs are not part of Local 12, we do not have a personal stake in Local 12's elections, we do not have a preference for either union slate, and we do not have knowledge of the OALJ employees' voting preferences. Respondent has thus failed to show that my impartiality in this case might reasonably be questioned.

Based on the foregoing, Respondent's second "affirmative defense" is denied.

### **3. Violations of LMRDA**

Complainant alleges that Respondent violated LMRDA § 401, 29 U.S.C. § 481(c). In short, Complainant's argument is that Local 12 failed to provide an accurate list of all union members to the Unifiers. The Unifiers then used this inaccurate list to send out its campaign literature. Complainant believes that this violation "may have affected the outcome of the election." *See* CMSD 2, 14. Therefore, Complainant requests that I declare the February 2012 election void, and I order a new officer election be held.

Respondent, in turn, does not dispute any of the facts supporting Complainant's argument – or if it does, it does not state what it disputes. Rather, Respondent distinguishes the cases cited by Complainant, and states that they do not apply in this case. In arguing for a hearing, Respondent states "this is a case of first impression in the Agency making this analogy and therefore there is no issue that a hearing must be held on the facts of this case." RRB 4.

#### **a. Local 12 violated LMRDA § 481(c).**

Based upon a plain reading of the statute, Respondent violated § 481(c) by failing to provide Ordynsky with the mailing addresses for all union members in good standing. Section 481(c) states that a labor organization has 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 . . .*"<sup>4</sup> The plain meaning of the statute mandates that once a reasonable request is made by a candidate, the union has a duty to distribute by mail or otherwise such materials to *all members in good standing*. The provision does not contain qualifying language regarding which members in good standing are to be mailed campaign literature. Nor does the provision allow for anything less than *all* members in good standing to be mailed such literature. Indeed, the provision's charge to mail campaign literature to *all* members comports with other similar language found throughout § 401. For example, § 401(e) requires the union to mail an election notice to "each member," "without regard to the reasonableness of the union's efforts to maintain an accurate and up-to-date list of its members addresses." 29 U.S.C. § 481(e); *Chao v. Local 54, Hotel Employees & Rest. Employees Int'l Union*, 166 F.Supp.2d 109, 113-14 (D.N.J. 2001) (finding language in LMRDA § 401(e) as requiring union to mail election notice to all members of union without regard to whether union inadvertently mailed such notices to incorrect addresses of some members).

The evidence before me shows that Respondent failed to provide Ordynsky with mailing labels listing *all* Local 12 members in good standing. CMSD Ex. 7, para. 9, 11-12. The mailing list did not include at least 273 eligible voters. *Ibid*; *see also id.* at 2. Respondent has not submitted any evidence to counter this fact. Thus, based on an application of these undisputed facts to the plain meaning of the statute, Respondent violated § 481(c).

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<sup>4</sup> I note that neither party contests that the Unifiers' request for the mailing labels, which listed the addresses of union members, was a reasonable request.

I note at this point that I am fully aware of the potential difficulties in maintaining an accurate and up-to-date list of all union members in good standing, as well as the effect my reading of the statute has on officer elections. A union's failure to provide a candidate with the mailing information for all union members does not necessarily mean that its failure to do so will automatically entail a reelection. It also must be shown that the union's failure to do so "may have affected the outcome of the election." Thus, a violation of § 481(c) will not warrant a reelection unless there is also a showing that this violation may have affected the election's outcome.

**b. Local 12's violation may have affected the outcome of the officer election.**

A "proved violation of § 401 [has] the effect of establishing a prima facie case that the violation 'may have affected' the outcome" of an election. *Wirtz v. Hotel, Motel & Club Employees Union, Local 6*, 391 U.S. 492, 506-07 (1968); see also *O.L.M.S. v. Local 738, Am. Fed'n of Gov't Employees*, ALJ No. 1999-SOC-1, at 17 (ALJ June 2, 1999) (ALJ citing, but not reaching the application of, *Wirtz* burden shifting framework). "This effect may of course be met by evidence which supports a finding that the violation did not affect the result." *Ibid.*<sup>5</sup>

Respondent relies on three arguments to show the violation would not have affected the officer election. First, Respondent states that Mr. Jerome King, "an experienced Economist and Statistician" will "establish that [OLMS's] theory that *The Unifiers* 'may have' won the election is pure fantasy." RRB 2. Second, Local 12 "is also able to call as witnesses those employees who voted in the election but did not receive the Unifiers' literature. Such testimony will prove that the literature would have had no impact upon the election." Finally, Local 12 contests OLMS's Exhibit 17, which is a sample of a few letters returned to the Unifiers as undeliverable. Local 12 specifically argues that the intended receipts would not have voted for the Unifiers.

Respondent's arguments are insufficient to rebut that its violation may have affected the election. Respondent may not rest upon mere conclusory allegations that it has an expert witness waiting to disprove Complainant's claims. "When a motion for summary decision is made and supported . . . , a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for hearing." 29 C.F.R. § 18.40(c). Respondent did not provide an affidavit for its expert, Jerome King. Nor did Respondent provide any facts showing what Mr. King will say at the hearing to show how the violation would not have affected the election.

Respondent's argument that it knows of and will call union members to testify that they would not have voted for the Unifiers is likewise defective. Respondent may overcome the presumption by providing tangible evidence that the violation did not affect the result of the election. *Solis v. Am. Fed'n of Gov't Employees*, 763 F.Supp.2d 154, 166 (D.C. Cir. 2011) (citing *Wirtz*, 391 U.S. at 507). Respondent again merely makes conclusory allegations that it is "able to

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<sup>5</sup> I note that the ARB has not applied the *Wirtz* burden shifting framework in any CSRA standards of conduct cases before it. However, this is almost surely the result of the dearth of CSRA cases adjudicated in the Department of Labor. I will nonetheless apply the *Wirtz* burden shifting framework to this case, as both this case and *Wirtz* involved violations of § 401. Moreover, the plaintiffs in both cases are the Department of Labor.

call as witnesses those employees who voted in the election but did not receive the Unifiers' literature." RRB 2. Assuming *arguendo* that this is proper rebuttal evidence for a CSRA election violation case, Respondent does not provide affidavits stating who such voters are or what they would say. And for the two names that Respondent does provide, it does not provide their signed affidavits. In all, Respondent does support its allegations with affidavits, as required by 29 C.F.R. § 18.40(c), or any other tangible evidence.

Rather, I find that Respondent's violation may have affected the outcome of the officer election. The Court of Appeals for the D.C. Circuit, which provides the controlling law for this case, states that a court must apply the "maximum theoretical possibility" approach to determine whether a violation may have affected the outcome of an election. *Marshall v. Am. Postal Workers Union, AFL-CIO*, 486 F. Supp. 79, 82 (D.C. Cir. 1980); *see also Solis*, 763 F.Supp.2d at 166. The theory of "maximum theoretical possibility" "assumes that all those who could have voted would have voted and that those who would have voted would have voted unanimously." *Marshall*, 486 F. Supp. at 82. Thus, for example, in a case where a union failed to send ballots to some of its members and sent ballots to some non-members, "if the sum of the number of eligible voters who did not receive ballots and the number of ineligible voters who did receive ballots is less than the margin of victory in a given decision, then the violations could not have affected the outcome. But . . . if the sum of these two numbers is greater than the margin of victory, then the court should necessarily assume that the violation may have affected the outcome." *Ibid.*

OLMS seeks to invalidate the elections for Local 12's President, Executive Vice President, Secretary, Head Steward, and Assistant Treasurer. They provide many exhibits, including affidavits and interview reports, in support of its Motion. In particular, the declaration of Alison Dunn, OLMS investigator, stated that after comparing the address list provided to Ordynsky with a list showing who paid union dues for the period covering the election, as well as a list of retirees, she determined that "at least 273 members who were eligible to vote were not on the list" provided to Ordynsky. CMSD Ex. 7, para. 11-12. OLMS also reviewed the margins of victory for each officer position and found that all were below 273. *See id.* at 8; Ex. 7, para. 14. Therefore, the fact that the Unifiers' campaign literature did not reach 273 eligible voters, and those voters *may have* voted differently, the elections for President, Executive Vice President, Treasurer, Secretary, Head Steward, and Assistant Treasurer should be invalidated. *Id.* at Ex. 7, para. 16.

OLMS did not seek to invalidate the election for Treasurer, as the Unifier candidate won despite the 273 eligible voters not receiving the campaign literature. *See* CMSD, Proposed Order, para. 1. Nevertheless, I find that all of Local 12's officer elections must be invalidated. As the margins of victory for all of the elections were less than 273, and 273 eligible voters did not receive the Unifiers' campaign literature, all the elections "may have been affected" by the § 401 violation. I therefore do not agree with OLMS that only the elections for President, Executive Vice President, Secretary, Head Steward, and Assistant Treasurer should be invalidated. It has cited not statute, regulation, or case law that allows me to invalidate only some elections that may have been affected, but not others that may have been affected. A plain reading of LMRDA §482(c) states that if I find a § 401 violation may have affected the outcome of an election, then "the court *shall* declare the election, if any, to be void and direct the conduct of a new election

under the supervision of the Secretary . . . .” The statute leaves no discretion for me to pick and choose which elections should actually be set aside. Put simply, I cannot choose to not invalidate an election where the party disadvantaged by the violation ended up winning the election.

Additional practical concerns compel my conclusion. First, it is possible that the Unifiers’ campaign literature will hurt its election results more than it will help. That is, under the theory of “maximum theoretical possibility,” it is possible, however unlikely, that after reading the Unifiers’ campaign literature, 273 eligible voters will disagree with Unifiers’ message and change their vote for Treasurer. Second, if I were to invalidate all of the officer elections except that of Treasurer, it will create the appearance of a preference by OLMS and OALJ in favor of the Unifiers. Such an appearance of partiality would be improper. OLMS enforces impartially, and the OALJ decides impartially, CSRA standards of conduct violations. Therefore, the elections for all Local 12 officers must be set aside.

#### **4. Maintenance of Jurisdiction**

Although not specifically articulated in its motion, Complainant appears to request (by way of its proposed Order) that I retain jurisdiction over this matter to certify that any new election was properly conducted. Such a provision may be appropriate where the parties agree, but in a contested matter such as this, it would be impractical to do so. This Recommended Decision and Order is subject to review by the Administrative Review Board, which may disagree with it; furthermore, as the election at issue will be voided, it appears that the entire process will start anew, with the opportunity for a new hearing at its conclusion. Finally, the applicable regulations do not specifically allow for me to retain jurisdiction. For all these reasons, I decline to do so.

#### **IV. CONCLUSION**

I find that no genuine issue of material fact exists for a hearing in this case. Respondent violated LMRDA § 401(c), 29 U.S.C. § 481(c), by failing to provide Ordynsky with the mailing addresses for all union members in good standing. Complainant has also shown that Respondent’s violation may have affected the outcome of the election under the “maximum theoretical possibility” approach. Moreover, Respondent has not met its evidentiary burden showing its violation did not affect the outcome of the election. As such, the February 2012 election of all of Local 12’s officers must be invalidated and a new election conducted under the supervision of Assistant Secretary.

#### **RECOMMENDED ORDER**

For the foregoing reasons, IT IS HEREBY ORDERED:

1. Complainant’s Motion for Summary Decision is GRANTED;
2. Respondent’s February 29, 2012 election for the offices of President, Executive Vice President, Treasurer, Secretary, Chief Stewart, and Assistant Treasurer is VOID;

3. A new election for the offices stated in the paragraph above will be conducted under the Complainant's supervision and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization;
4. The supervised election shall be conducted within 90 days from entry of this Order; and
5. The hearing scheduled for September 11, 2013 is CANCELED.

**SO ORDERED.**

**PAUL C. JOHNSON, JR.**  
Associate Chief Administrative Law Judge

**NOTICE OF OPPORTUNITY TO FILE EXCEPTIONS:** On this date, pursuant to 29 C.F.R. § 458.88(b), I am transferring this Recommended Decision and Order, along with the case record, to the Administrative Review Board. Under 29 C.F.R. § 458.88(c), within fifteen (15) days of service of this decision upon the parties, the parties may file exceptions to my Recommended Decision and Order with the Administrative Review Board at the following address:

Administrative Review Board  
U.S. Department of Labor  
Room S-5220  
200 Constitution Ave, NW  
Washington, DC 20210

Title 29 C.F.R. § 458.89 discusses the necessary contents of exceptions to a Recommended Decision and Order and 29 C.F.R. § 458.90 discusses the requirements associated with briefs accompanying the exceptions. Under 29 C.F.R. § 458.91, absent timely exceptions, the Administrative Review Board may, at its discretion, without comment, adopt the Recommended Decision and Order.