CHIEF, DIVISION OF ENFORCEMENT, OFFICE OF LABOR-MANAGEMENT STANDARDS, UNITED STATES DEPARTMENT OF LABOR,

COMPLAINANT,

v.

LOCAL 12, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

RESPONDENT.

ARB CASE NOS. 13-094
14-081

ALJ CASE NO. 2013-SOC-001

DATE: September 24, 2014

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Shireen McQuade, Esq.; Clinton Wolcott, Esq.; Christopher Wilkinson, Esq.; M. Patricia Smith, Esq.; *U.S. Department of Labor,* Washington, District of Columbia

For the Respondent:
Alexander J. Bastani, Esq.; *American Federation of Government Employees, Local 12*; Washington, District of Columbia

Before: Paul M. Igasaki, *Chief Administrative Appeals Judge;* Luis A. Corchado, *Administrative Appeals Judge*; and Lisa Wilson Edward, *Administrative Appeals Judge*. Judge Corchado, concurring and dissenting.

FINAL DECISION AND ORDER OF REMAND

This case arises under Title VII of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C.A. § 7101 *et seq.* (Thomson West 2014); the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C.A. §§ 401-531 (West 1998); and implementing regulations, 29 C.F.R. Part 458 (Standards of Conduct) (2014). On March 13, 2013, the Office of Labor Management Standards (OLMS) filed a complaint with the Office of Administrative Law Judges

(OALJ) seeking an order to declare void a February 29, 2012 officer election of the Local 12, American Federation of Government Employees (Local 12 or Union). On September 4, 2013, an Administrative Law Judge (ALJ) entered a recommended decision and order granting complainant OLMS's motion for summary decision, voiding the February 29, 2012 election, and ordering an OLMS supervised election for all Union offices. ALJ Recommended Decision and Order (dated Sept. 14, 2013) (R. D. & O.). On September 19, 2013, the Union filed Exceptions to the ALJ's order with the Administrative Review Board (ARB). On September 30, 2013, OLMS filed Exceptions with the ARB seeking modification of the relief. We affirm the ALJ's R. D. & O. and remand to the ALJ for the conduct of a supervised election.

BACKGROUND

Local 12 represents approximately 1,200 Department of Labor union members. This case focuses on a February 29, 2012 election for the offices of President, Executive Vice President, Treasurer, Secretary, Chief or Head Steward, and Assistant Treasurer. Three parties ran slates of candidates for the Union office positions; the parties were "Activists," "Unifiers," and "Independents."

The Union maintained a membership list that was used to send out election notices to Union members. For a fee, candidates can obtain this list in the form of mailing labels to send out campaign literature. R. D. & O. at 1. On or about February 10-14, 2012, Local 12 staffer Megan Guerriero printed a set of mailing labels from the membership list to send out election notices, which were then mailed. *Id.* at 2. On February 20, 2012, Eugenia Ordynsky, the Unifiers' candidate for President, purchased a set of labels from the Union to distribute the Unifiers' campaign literature to the Union membership. *Id.* The mailing labels were derived from the same set that Guerriero had used to send out the election notices. *Id.* Shortly after providing the list to the Unifiers, the Union became aware of several defective addresses. Union staffer Guerriro "received approximately 50 election notices that were returned as undeliverable," and she "received calls and emails informing her that the election notices were not being properly distributed." *Id.* The Union then sought out correct information and updated its membership list. *Id.* However, the Union did not notify Ordynsky, nor anyone in the Unifiers party, of the errors contained in the earlier Union mailing list that they had used. *Id*. The election took place on February 29, 2012, and the Unifiers party lost each race except one. The results and margins of victory for each Union race were as follows:

> President, Activist party candidate won by 53 votes
> Executive Vice President, Activist party candidate won by 59 votes
> Treasurer, Unifiers party candidate won by 82 votes
> Secretary, Activist party candidate won by 3 votes
> Head Steward, Independent party candidate won by 25 votes
> Assistant Treasurer, Activist party candidate won by 4 votes

Id.

After the errors in the prior Union membership list became known, a complaint was filed with OLMS. OLMS compared the updated membership list with the list given to the Unifiers and found that 273 members who were eligible to vote were not on the Unifiers' mailing list. OLMS determined that the deficiency "may have affected" the election. *Id.* at 3. OLMS and the Union failed to reach an agreement, and OLMS filed a complaint with the OALJ. An ALJ set the case for hearing. On August 2, 2013, OLMS moved for summary decision.

On September 4, 2013, the ALJ entered an R. D. & O. granting summary decision in favor of OLMS. The ALJ determined, inter alia, that the Union violated Section 401 of the LMRDA, and the CSRA implementing regulation, 29 C.F.R. § 458.29, by "failing to provide [a candidate for Union office] with the mailing address[es] for all union members in good standing." R. D. & O. at 8. The ALJ further determined that this violation "may have affected the outcome of the officer election." *Id.* at 10. The ALJ found that "at least 273 members who were eligible to vote were not on the list" provided to Ordynsky and the Unifiers party and that the "margins of victory for each officer position . . . all were below 273." *Id.* Based on this violation, the ALJ recommended that the February 29, 2012 election be rendered void in its entirety, and ordered a new election supervised by the OLMS. *Id.* at 11-12.

JURISDICTION AND STANDARD OF REVIEW

On February 5, 2013, the Department of Labor issued a Final Rule amending several sections of 29 C.F.R. Part 458 to substitute the Administrative Review Board for the Assistant Secretary of the Employment Standards Administration for purposes of reviewing decisions issued by Department Administrative Law Judges on complaints initiated under 29 C.F.R. § 458.66(b), (c). The standards of conduct set out in Section 401 of the LMRDA, 29 U.S.C.A. § 481 govern the election of union officers subject to the CSRA, 5 U.S.C.A. § 7101 *et seq*. The ARB is authorized to review Exceptions to an ALJ recommended decision and order in these cases pursuant to 29 C.F.R. § 458.88(c), and issue decisions pursuant to 29 C.F.R. § 458.91(a). *See also* Secretary's Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); *Chief, Div. of Enforcement, Office of Labor-Mgmt. Standards v. Local 2419, American Fed. of Gov't Employees*, ARB No. 13-037, ALJ No. 2012-SOC-002, slip op. at 1-2, n.3 (ARB Mar. 20, 2013).

On motion for summary decision, we view the evidence in the light most favorable to the nonmoving party and then determine whether there are any genuine issues of material fact and whether the ALJ correctly applied the relevant law. *Smale v. Torchmark Corp.*, ARB No. 09-012, ALJ No. 2008-SOX-057, slip op. at 5-6 (ARB Nov. 20, 2009). A party opposing a motion for summary decision "may not rest upon the mere allegations or denials of [a] pleading. [The response] must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). Summary decision is appropriate only when the evidentiary record demonstrates that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 29 C.F.R. § 18.40; *cf.* Fed. R. Civ. P. 56(c).

DISCUSSION

A. Statutory and Regulatory Framework

Under the CSRA, Congress recognized the right of federal employees "to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them . . . ." 5 U.S.C.A. § 7101(a)(1). Congress recognized that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C.A. § 7101(a). The CSRA sets out "Standards of conduct for labor organizations" that include the "maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, [and] to receive fair and equal treatment under the governing rules of the organization . . . ." 5 U.S.C.A. § 7120(a)(1). The CSRA directs the Department of Labor to "prescribe such regulations as are necessary to carry out the purposes of this section." 5 U.S.C.A. § 7120(d). That provision reads:

> 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 matter 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.

5 U.S.C.A. § 7120(d). In accordance with the statutory directive that regulations "conform generally to the principles applied to labor organizations in the private sector," the Labor Department regulations promulgated standards of conduct for labor organization elections, incorporating provisions of the LMRDA, 29 U.S.C.A. § 481. See 29 C.F.R. § 458.29 ("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 . . . .").

Section 401 of the LMRDA (Subchapter V – Elections), 29 U.S.C.A. § 481, sets out labor organization election procedures. The statue requires, inter alia, that labor organizations

> 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 . . . .

29 U.S.C.A. § 481(c). The provision gives union candidates the right, thirty days prior to an election, to "inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership

therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof." *Id.* The statute requires that the distribution of campaign literature and use of member lists shall be made available to candidates for union office without discrimination in favor of or against any candidate. *Id.*

Labor Department regulations implementing these statutory requirements authorize the Chief, Division of Enforcement (DOE Chief) in the Office of Labor Management Standards, to proceed with an administrative enforcement action upon "conclud[ing] that there is probable cause to believe that a violation has occurred which may have affected the outcome of the election." 29 C.F.R. § 458.65(a). In proceedings before an ALJ concerning violations of the standards of conduct for election of labor organization officers (29 C.F.R. § 458.29), the DOE Chief must prove the allegations of the complaint by a preponderance of the evidence. 29 C.F.R. § 458.79. At the close of the administrative proceeding, the ALJ shall prepare a recommended decision and order containing "recommendations as to the disposition of the case including the remedial action to be taken." 29 C.F.R. § 458.88(a). Exceptions to the ALJ's recommended decision and order can be filed with the ARB. 29 C.F.R. §§ 458.88(c), 458.91.

B. Undisputed record evidence supports the ALJ's determination that the Union's failure to provide to Unifiers a mailing list of members in good standing may have affected the election in violation of the LMRDA and CSRA, and implementing regulations

The LMRDA makes clear that participation in elections shall be made available to "members in good standing" of the labor organization. See 29 U.S.C.A. § 481(a)-(e). The statute states that national labor organizations shall conduct elections no less than every five years "among the members in good standing" (29 U.S.C.A. § 481(a)), and local labor organizations shall elect officers no less often than every three years among "members in good standing" (29 U.S.C.A. § 481(b)). Section 481(c) requires that the Union comply with reasonable requests of any candidate to distribute by mail campaign literature to "all members in good standing of such labor organization." *See also* 29 U.S.C.A. § 481(d) (Election of officers of intermediate bodies within labor organizations shall be conducted no less than every four years "among the members in good standing."). Notices of elections are required to be mailed to members in good standing. 29 U.S.C.A. § 481(e).

There is no dispute that Union staff failed to provide a membership list with the correct names and addresses of Union members in good standing to Ordynsky, when she sought the mailing list to distribute campaign literature supporting the slate of candidates running in the Unifiers party. This failure is a clear violation of the Act. Although Union staff may have thought that the membership mailing list provided to the Unifiers on February 20, 2012, was current, the staff was made aware before the election that the mailing list "was defective after [Guerriero] received approximately 50 election notices that were returned as undeliverable." R. D. & O. at 2. Guerriero also "received calls and emails informing her that the election notices were not being properly distributed." *Id.* While Union staff sought to remedy the problem, "no one informed Ordynsky or the Unifiers of the problems with the old mailing list." *Id.* This failure by the Union contravenes the obvious purpose of the statute, which is "to ensure maximum participation in union elections by rank and file members." *Reich v. District Lodge 720*, 11 F.3d 1496, 1501 (9th Cir. 1993) (*citing Donovan v. Sailors' Union of the Pacific*, 739

F.2d 1426, 1430 (9th Cir. 1984)), *see also Brennan v. Local Union No. 639, et al.*, 494 F.2d 1092, 1097-1098 (D.C. Cir. 1974) (where notice of election had been mailed to only 42% of the union membership, and only 23% of membership voted, election was void despite contention that union had a reasonable excuse for failure to have address of all of its members); *Wirtz v. Local 169, Hod Carriers*, 246 F. Supp. 741 (D. Nev. 1965) (court sets aside an election when out of 512 eligible members, 30 had no notice of the election and only 161 members voted).

The Union argues (Exceptions (Union Exc.) at 3-4) that even though it did not provide a membership mailing list with members in good standing to the Unifiers party prior to the election, the ALJ erred in determining on summary decision that this failure may have affected the election. In making this argument, however, the Union failed to present any documentary evidence showing that the Unifiers' use of an erroneous mailing list did not affect the election. *See Reich*, 11 F.3d at 1499 ("once a violation of section 481 is established, the union has the burden of showing that it did not affect the outcome of the election.") (*citing Wirtz v. Hotel Employees Union Local 6*, 391 U.S. 492, 506-507 (1968)). A party opposing a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing." 29 C.F.R. § 18.40(c). The Union, however did not proffer any evidence in its response to OLMS's motion for summary decision to show that the Union's errors did not affect the election. The ALJ found, based on evidence OLMS proffered, that there were 273 voters that did not receive the Unifiers' campaign literature. R. D. & O. at 2-3. The ALJ further found that the margins of victory for all six offices were well under 273. *Id.* at 2, 10. Based on this undisputed evidence, the ALJ reasonably concluded that the Union's failure to provide the Unifiers party the current membership mailing list, or to notify the Unifiers party that the list they had was deficient and provide a current one, may have affected the election. *See also Brennan*, 494 F.2d at 1098 ("The uncontradicted evidence showing that the Union had violated § 401(e) created a prima facie case that the election may have been affected. Since the Union was unable to contradict this by raising any factual dispute as to a material fact, the district court correctly held that the Secretary was entitled to summary judgment.").

The Union argues (Union Exc. at 4) that a comparison of the margins of victory with the number of persons who failed to receive the Unifiers' campaign literature does not establish that the election outcome may have been affected. The ALJ, however, may rely on these numbers. Integral to the LMRDA election process is that labor organizations elect officers "by secret ballot." 29 U.S.C.A. § 481(a), (b). As the court of appeals explained in *Reich*, "[a] secret ballot election is one in which it is intended that the choices made by voters will remain secret." 11 F.3d at 1500. "While an individual is free to disclose his vote, the LMRDA's secrecy mandate extends not only to the actual casting of ballots but also to any post-voting procedure designed to determine how individual union members voted or would have voted." *Id*. The court of appeals in *Reich* further observed that in determining whether an outcome of an election was affected by a union's violation of Section 481

> the court must not examine how members who were not sent notification would have voted, but rather how many additional eligible voters (who did not actually vote) would have received notices had there been compliance with the statute. If the number is sufficient to affect the outcome of the election, the results must

> be set aside. Whether the members who did not vote and did not receive notice would have actually voted and, if so, for whom is not a proper subject of judicial inquiry.

Id. at 1501.

In this case, the undisputed evidence shows that the Union's failure to provide the correct mailing list to the Unifiers prevented 273 members in good standing from receiving the party's campaign literature – a number far greater than the margins of victory for each of the Union officer positions. See *supra* at 2. These facts fully support the ALJ's determination that the Union's violation of the LMRDA, CSRA, and implementing regulations may have affected the Union's February 2012 officer election.[1]

C. The ALJ acted within his remedial discretion in invalidating the February 2012 Union officer election

When a union election violation is found, the CSRA gives the Labor Department discretion to order appropriate relief. The statute states:

> In any matter 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.

5 U.S.C.A. § 7120(d). OLMS sought to invalidate the February 2012 Union election for President, Executive Vice President, Secretary, Chief or Head Steward, and Assistant Treasurer. OLMS did not seek invalidation of the election for Treasurer, which was won by the Unifiers' candidate. The ALJ recommends invalidating the February 2012 Union officer election in its entirety, including for Treasurer, and that a new election be ordered and supervised by OLMS within 90 days of a final order. R. D. & O. at 11-12; see also 29 C.F.R. § 458.88(a) (directing ALJ to make "recommendations as to the disposition of the case including the remedial action to be taken."). In making this recommendation, the ALJ cites to the remedy covering private sector

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[1] While the ALJ relied on the "maximum theoretical possibility" approach set out in *Marshall v. Am. Postal Workers Union, AFL-CIO*, 486 F. Supp. 79, 82 (D.D.C. 1980), we need not expound on that theory here. As explained, *supra* at 5-6, the ALJ reasonably concluded under the principles enunciated by the court of appeals in *Reich* that the significant number of members in good standing who did not receive the Unifiers' campaign literature because of errors in the mailing list, and the small margins of victory in the February 2012 election for Union officers, is sufficient showing that the Union's violation affected the election. *See also Dole v. Graphic Communications Int'l. Union AFL-CIO*, 722 F. Supp. 782, 786 (D.D.C. 1989) ("Some 5,593 votes were not counted. The margin of victory in the contested elections ranged from 234 to 4,444 votes. Thus, using the maximum theoretical possibility theory, it is clear that the election may have been affected by the exclusion of the 5,593 votes. See *Postal Workers*, 486 F. Supp. at 82.").

labor organizations set out in Section 402 of the LMRDA, 29 U.S.C.A. § 482(c), which requires the conduct of a new election on determination of a LMRDA violation.[2]

The LMRDA requires unions to make "reasonable efforts to maintain an accurate mailing list." *Reich*, 11 F.3d at 1502. A failure in doing so "risk[s] that its election will be invalidated." *Id*. While CSRA, 5 U.S.C.A. § 7120, does not expressly incorporate Section 402 of the LMRDA (29 U.S.C.A. § 482), it is within the ALJ's discretion to void a tainted election, and order a new, supervised election consistent with the process set out in LMRDA, 29 U.S.C.A. § 482. This remedy is consistent with relief afforded in union officer election disputes in the private sector, and seems to be an effective remedy by virtue of the statute and case law interpreting the statute. *See, e.g., Brennan*, 494 F.2d 1092; *Wirtz v. Local 169, Int'l Hod Carriers*, 246 F. Supp. 741.

OLMS argues (Exceptions (OLMS Exc.) at 2-4) that the ALJ abused his discretion by invalidating the election for Treasurer where a Unifiers candidate was elected, stating that the ALJ was not compelled to invalidate all offices under § 482(c). While we agree that the ALJ was not compelled to invalidate the election in its entirety, it is certainly within the ALJ's discretion to do so.[3] See 29 C.F.R. § 458.88(a) (directing the ALJ at the close of a hearing to prepare "recommendations as to the disposition of the case including the remedial action to be taken."). OLMS argues (OLMS Exc. at 3) that under *Usery v. Stove Furnace*, 547 F.2d 1043 (8th Cir. 1977), it contravenes policy to "require a candidate to again run for an office he or she won despite a violation that disfavored that candidate." *Usery* involved the invalidation of an election based on a prohibited use of union funds to fund an endorsement of a slate of candidates from a retiring president. In that case, one candidate who was not endorsed won nonetheless.

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[2] Section 402(c) of the LMRDA provides that

> [i]f, upon a preponderance of the evidence after a trial upon the merits, the court finds (1) that an election has not been held within the time prescribed by section 481 of this title, or (2) that the violation of section 481 of this title may have affected the outcome of an election, the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary 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 the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 481 of this title, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

29 U.S.C.A. § 482.

[3] The Standards of Conduct regulations expressly provide a "Bill of rights of members of labor organizations" ensuring equal rights and privileges in the election process. 29 C.F.R. § 458.2.

However, this case and the principles OLMS advanced are not a proper basis for modifying the relief the ALJ ordered. The campaign literature that the Unifiers intended to mail to Union members in good standing lists all Unifiers candidates running for office, with an e-mail address for questions, a link to a Twitter account, and a Facebook account. See OLMS Motion for Summary Decision, Exhibit 15. While OLMS seeks to exclude the Treasurer position from the relief ordered, that would require a belief that absent the violation, Unifiers literature would favor Unifiers (and indeed *not disfavor* Unifiers). Pursuant to *Reich*, however, we must refrain from predicting what voters in the Union officer election may have done had they received the Unifiers campaign literature. See 11 F.3d at 1501 ("a court must not examine how members who were not sent notification would have voted"). Because we refrain from assuming how a Union voter in the February 2012 officer election might have been influenced by the Unifiers' campaign literature, the relief ordered by the ALJ shall be applied equally to the election for Treasurer.

D. The Union failed to prove systemic bias within the agency

The Union argues (Union Exc. at 2-3) that the ALJ was biased by virtue of failing to afford the Union an opportunity to present evidence in the context of a hearing, that the ALJ was biased because Local 12 represents employees in the OALJ, and ALJs are considered part of management. Local 12 also argues that the ARB is biased because the Union Steward has personally represented ARB employees against the ARB.

First, the ALJ did not err by deciding the case on summary decision, as the Union failed to demonstrate any genuine issue of material fact that would preclude such disposition of the case. Second, the Union failed to show any bias by the ALJ that would foreclose a ruling on the issues presented. The ALJ correctly found the Union's arguments conclusory and without merit and that there was no need for him to recuse himself. R. D. & O. at 7. The ARB generally "presume[s] that an ALJ is unbiased unless a party alleging bias can support that allegation; and bias generally cannot be shown without proof of an extra-judicial source of bias." *Matthews v. Ametek, Inc.*, ARB No. 11-036, ALJ No. 2009-SOX-026, slip op. at 5 (ARB Mar. 31, 2012); *Matter of Slavin*, ARB No. 04-088, ALJ No. 2004-MIS-002, slip op. at 15-18 (ARB Apr. 29, 2005); *Eash v. Roadway Express, Inc.*, ARB No. 00-061, ALJ No. 1998-STA-028, slip op. at 8 (ARB Dec. 31, 2002). "Unfavorable rulings and possible legal errors in an ALJ's orders generally are insufficient to prove bias." *Matthews*, ARB No. 11-036, slip op. at 5; *Powers v. Paper, Allied-Indust., Chem. & Energy Workers Int'l Union*, ARB No. 04-111, ALJ No. 2004-AIR-019 (ARB Aug. 31, 2007). Here, the Union has failed to show that the ALJ had any personal bias against it based on any extra-judicial source.

Finally, the Union failed to show any systemic bias against it by DOL entities involved in handling election disputes. While some staff at the ARB may be affiliated with Local 12, and Local 12 has defended members in employment disputes, neither the ALJ nor the panel members of the ARB are members of the Union, so they would have no reason to favor one party's

candidates over another. Local 12 has provided no evidence to suggest bias affecting adjudication of this dispute.[4]

E. The ALJ's order for a new supervised election is not moot by virtue of the intervening Union officer election in February 2014

The Union argues (Union Exc. at 5-6) that the ALJ is precluded from requiring a new, supervised election as a remedy for the February 2012 violation, because the need for relief became moot by the most recent Union officer election held in February 2014. This argument, however, lacks merit.

It is well established in *Wirtz v. Glass Bottlers Local 125, Laborers Int'l Union*, 389 U.S. 463 (1968), that an intervening unsupervised election does not moot the LMRDA's command for a new supervised election once a violation has been shown. In *Wirtz*, the Court made clear that under LMRDA Section 402, "Congress unequivocally declared that once the Secretary establishes in court that a violation of Section 401 may have affected the outcome of the election, 'the court shall declare the election . . . to be void and direct the conduct of a new election under supervision of the Secretary . . . .'" 389 U.S. at 473-474. The fact of an intervening election does not change this mandate. The Court explained that: "The notion that the unlawfulness infecting the challenged election should be considered as washed away by the following election disregards Congress' evident conclusion that only a supervised election could offer assurance that the officers who achieved office as beneficiaries of violations of the Act would not by some means perpetuate their unlawful control in the succeeding election." *Id.* at 474. Failing to remedy a prior violation would "immunize a proved violation from further attack and leave unvindicated the interests protected by Section 401." *Id.* at 475; see also *Reich*, 11 F.3d at 1504 n.11. Thus, the intervening election, that followed the tainted February 2012 Union officer election, does not render relief moot.

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[4] The Union argues (Union Exc. at 4) that the Unifiers party violated the LMRDA by using employer resources in the Francis Perkins Building, that use of such resources could have affected the election, and that the ALJ erred in failing to hold a hearing on this claim. According to OLMS, Local 12 did not make this claim below. On review of the record, it is clear that the Union failed to properly advance these arguments before the ALJ. Since this argument was not raised below, we will not consider this issue for the first time on appeal. *See Anderson v. Metro Wastewater Reclamation Dist.*, ARB No. 01-103, ALJ No. 1997-SDW-007, slip op. at 9 (ARB May 29, 2003) (issues raised for first time on appeal are not considered) (*citing Singleton v. Wulff*, 428 U.S. 106, 119 (1976)); *see also NLRB v. General Teamsters Union Local 662*, 368 F.3d 741, 746 (7th Cir. 2004) (affirming that argument not made to ALJ cannot be made before NLRB).

CONCLUSION

The ALJ's Recommended Decision and Order is **AFFIRMED.** The February 29, 2012 Union officer election is **VOID**, and the case is remanded to the ALJ to oversee the conduct of a supervised election to take place 90 days from the date of this order.

SO ORDERED.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge

Judge Luis A. Corchado, concurring and dissenting.

I concur with affirming the ALJ's order for a supervised election as the ALJ deems appropriate after considering the parties' input, but I respectfully disagree that we can or should void the Treasurer's election. I succinctly explain my concurrence and dissent.

As a preliminary matter, the nature and scope of the Board's review and authority is not clear. OLMS filed a complaint against the Union and alleged that it violated the LMRDA, 29 U.S.C.A. § 481(c), "made applicable to federal sector labor organizations by 7120 of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 7120(d), and section 458.29 of the Department's Regulations, 29 C.F.R. § 458.29."[5] But section 458.29 expressly provides that the election standards of 29 U.S.C.A. § 481(c) apply to covered unions "*to the extent* that such standards are relevant to elections held pursuant to the provisions of 5 U.S.C. § 7120. . . ." (Emphasis added.) The reach of 5 U.S.C.A. § 7120 is unclear. On its face, it appears to set forth the proof requirements imposed on unions that seek "recognition" from a federal agency, that is, requirements to prove that elections are "free from corrupt influences and influences opposed to basic democratic principles." Consequently, if the union fails to meet the proof requirements, then presumably the union loses its "recognition." The Assistant Secretary is empowered to prescribe regulations necessary "to carry out the purposes of this section [7120]." If an agency concludes that a union's elections are not fair and democratic, presumably, it must take the steps reasonably required of the Assistant Secretary to secure or maintain agency "recognition." The Union may appeal OLMS's findings that (1) a violation occurred and (2) the violation may have affected an election. Ultimately, upon finding a violation, the Board "may require the respondent [Union] to take such affirmative action as it deems appropriate to effectuate the policies of the CSRA or FSA," presumably to furnish sufficient proof that a violation has been remedied and that elections will be democratic and fair. It is not clear whether voiding an

[5] OLMS's responsive brief, p. 1.

election or ordering the Union to submit to a supervised election falls within the meaning of appropriate "affirmative action," and whether such a remedy is appropriate for the violation that occurred in this case.

Assuming the Board has authority to review the remedy requested in this matter, I affirm because of the Union's failure to file a substantive response to OLMS's motion for summary judgment. OLMS filed a motion for summary judgment that clearly identified the fundamental flaw in the mailing list and provided an evidentiary basis for supporting its position that the flaw "may have affected" the elections of five of the six candidates. The motion was supported with affidavits. Local 12 filed a 5-page very general response without producing any evidence that it could create a genuine issue of material fact for trial, only promises to produce evidence showing that OLMS is wrong. Local 12 began to make a strong point when it said that the first two postcards exposed a flaw in OLMS's logic, but the argument ended there and without supporting evidence.[6] This is clearly deficient. The arguments in Local 12's appellate filing were sparser than the arguments in the response filed with the ALJ. Given that OLMS produced sufficient evidence to justify the ALJ's ruling without any substantive countervailing response, I affirm the ALJ's ruling as to 5 of the 6 elected officers.

As for the Treasurer's election, in my view, there is no substantive factual basis in the record for voiding this election. The members' choice should be honored unless there is sufficient evidence to warrant the extreme remedy of voiding the members' choice. OLMS did not ask for this relief when it filed its complaint and, logically, neither OLMS nor any other party proffered evidence to support such a remedy. In short, I am persuaded by OLMS's arguments in the exceptions it filed.

LUIS A. CORCHADO
Administrative Appeals Judge

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[6] In fact, I have strong reservations about OLMS's argument that the mailing flaw "may have affected" the elections at all, but my reservations arise from the very speculative nature of the statistical probabilities in this case. In my view, it seems far too simplistic to argue that the number of affected voters exceeds the margin of victory and, therefore, the incomplete mailing list may have affected the vote. There are too many fundamental variables that trained statisticians would have considered before rendering an opinion as to whether the violation may have affected the vote. For example, it seems that statisticians would have considered the less than 50% voter turnout, the actual voting results, and the significance of the campaign mailer itself. For the same reasons, without more analysis than contained in the record, I find the "maximum theoretical possibility" theory insufficient to satisfy OLMS's burden of proof. See R. D. & O. at 10. Again, the Union failed to advance sufficient argument on these points.