

**U.S. Department of Labor**

Administrative Review Board  
200 Constitution Ave. NW  
Washington, DC 20210-0001



**IN THE MATTER OF:**

**TRACY SHANKER, CHIEF,  
DIVISION OF ENFORCEMENT,  
OFFICE OF LABOR MANAGEMENT  
STANDARDS, UNITED STATES  
DEPARTMENT OF LABOR,**

**ARB CASE NO. 2023-0001**

**ALJ CASE NO. 2021-SOC-00002**

**DATE: January 23, 2023**

**COMPLAINANT,**

**v.**

**PATENT OFFICE  
PROFESSIONAL ASSOCIATION,**

**RESPONDENT.**

**Appearances:**

***For the Complainant:***

**Beverly Dankowitz, Esq., Eleanore I. Simms, Esq., and Christa N.  
Henderson, Esq.; *U.S. Department of Labor*; Washington, District of  
Columbia**

***For the Respondent:***

**Richard J. Hirn, Esq.; *Patent Office Professional Association*;  
Washington, District of Columbia**

**Before: HARTHILL, Chief Administrative Appeals Judge, and BURRELL,  
Administrative Appeals Judge**

## ORDER DENYING RESPONDENT'S MOTION FOR A TEMPORARY STAY OF THE ADMINISTRATIVE REVIEW BOARD'S REMEDIAL ORDER

This case arises under Title VII of the Civil Service Reform Act of 1978 (CSRA),<sup>1</sup> the Labor-Management Reporting and Disclosure Act (LMRDA),<sup>2</sup> and the Standards of Conduct (SOC) regulations issued pursuant to the CSRA.<sup>3</sup> On January 5, 2023, Respondent Patent Office Professional Association (POPA) filed a Motion for a Temporary Stay of the Administrative Review Board's Remedial Order (Motion). For the reasons set forth below, we deny POPA's Motion.

### BACKGROUND

POPA is a labor union that serves as the collective bargaining representative of the professional employees of the United States Patent and Trademark Office. POPA held its regular triennial election for union President (Election) and other positions by mail ballot on November 13, 2020. Incumbent Kathleen Duda was re-elected President over challengers Kurt Mueller and Razu Miah.

On December 28, 2020, Miah filed a complaint with the United States Department of Labor's (Department) Office of Labor Management Standards (OLMS) alleging that POPA violated section 401(c) of the LMRDA<sup>4</sup> by failing to comply with Miah's reasonable request to distribute campaign literature before the Election. OLMS, in turn, filed a complaint with the Department's Office of Administrative Law Judges concerning Miah's allegations on August 9, 2021.

On September 28, 2022, an Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.), determining that undisputed evidence established that POPA, through its designated third-party printer, failed to respond to Miah's reasonable request to distribute campaign literature in violation of LMRDA section 401(c), and that such violation may have affected the outcome of the Election. Accordingly, the ALJ recommended that the Election results be voided and that POPA be ordered to conduct a new election for President under the supervision of OLMS.

POPA filed exceptions to the ALJ's R. D. & O. with the Administrative Review Board (ARB or the Board) on October 5, 2022. On November 16, 2022, the Administrative Review Board (ARB or the Board) issued a Decision and Order Affirming Recommended Decision and Order and Ordering New Election (D. & O.).

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<sup>1</sup> 5 U.S.C. §§ 7101–7135.

<sup>2</sup> 29 U.S.C. §§ 401–531.

<sup>3</sup> 29 C.F.R. Part 458 (2022).

<sup>4</sup> 29 U.S.C. § 481(c).

The ARB agreed with the ALJ that the undisputed evidence established that POPA violated the LMRDA by failing to respond to Miah’s reasonable request to distribute campaign literature for the Election.<sup>5</sup> The Board also determined that POPA’s violation may have affected the Election’s outcome.<sup>6</sup> Accordingly, the ARB declared the Election void and ordered that POPA conduct a new election for the office of President under OLMS’s supervision in accordance with the CSRA and SOC regulations and, so far as lawful and practicable, in conformity with POPA’s bylaws and constitution.<sup>7</sup> The ARB directed the new, supervised election to be conducted by March 16, 2023.<sup>8</sup>

On January 3, 2023, Respondent filed the Motion, requesting the Board stay the remedy ordered in the D. & O. OLMS filed a brief in opposition (Opposition) to Respondent’s Motion on January 13, 2023.

### DISCUSSION

The SOC Regulations grant the Board the discretion to stay its orders for remedial action.<sup>9</sup> In its Motion, POPA asserts that it is scheduled to conduct its next regular triennial election for several positions, including President, in November 2023. POPA requests the Board stay its order directing the union to conduct an interim, remedial election until November 1, 2023, “so that the supervised election that the Board has ordered will be conducted simultaneously with and as part of the union’s prescheduled and mandatory triennial election.”<sup>10</sup> We deny POPA’s request.

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<sup>5</sup> D. & O. at 9–17.

<sup>6</sup> *Id.* at 17–21.

<sup>7</sup> *Id.* at 21–22. As we explained in the D. & O., when a union is found to have violated LMRDA section 401, the ARB, by delegation from the Secretary of Labor, has the discretion under the CSRA and SOC regulations to order appropriate relief. 5 U.S.C. § 7120(d); 29 C.F.R. § 458.91(b). The LMRDA, incorporated into the SOC regulations, provides that if a court finds a violation of section 401 that 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.” 29 U.S.C. § 482(c); *see also Chief, Div. of Enf’t, Off. of Lab.-Mgmt. Standards, U.S. Dep’t of Lab. v. Local 12, Am. Fed’n of Gov’t Emp.*, ARB Nos. 2013-0094, 2014-0081, ALJ No. 2013-SOC-00001, slip op. at 8 (ARB Sept. 24, 2014) (stating that it is within the Board’s discretion to order the relief provided by the LMRDA, and that this relief “seems to be an effective remedy by virtue of the statute and case law interpreting the statute.”(citations omitted)).

<sup>8</sup> Specifically, the D. & O. directed POPA to conduct the new election within 120 days of the issuance of the Board’s order on November 16, 2022. Accordingly, POPA has until March 16, 2023, to conduct the new election.

<sup>9</sup> 29 C.F.R. § 458.93.

<sup>10</sup> Motion at 2.

POPA offers two justifications for its request to stay the interim, remedial election. First, POPA summarily contends that “[s]uccessive elections so close together would likely result in a drop-off in participation in the second election, undermining the democratic objectives that the FSLMR Statute and the LMRDA seek to promote.”<sup>11</sup> As ordered, POPA must conduct its remedial election for President by March 16, 2023, eight months before its next regular triennial election in November. POPA offers no evidence to support its claim that it is likely to suffer a drop-off in voter participation with a gap of this length between the elections. We find POPA’s unsupported concern to be speculative and insufficient to justify staying the remedial order.

Second, POPA contends that the purposes of the LMRDA would be better served if OLMS supervises POPA’s regular election of a full slate of officers and delegates, rather than just supervising an interim, remedial election solely for the office of President. POPA asserts that the interim President would only serve for a matter of months until the next regular election, and that OLMS’s assistance with POPA’s regular election would “help ensure compliance and help insulate the next election from protest.”<sup>12</sup>

We disagree with POPA that the purposes of the LMRDA and CSRA will be better served by staying the remedial election for President until the next regular election in November 2023, rather than having such election conducted promptly in the interim. As we stated in the D. & O., the purpose of the LMRDA and the CSRA is to ensure free and fair democratic elections and governance in labor organizations.<sup>13</sup> In light of “perceived abuses that plagued labor relations and undermined public confidence in the labor movement,”<sup>14</sup> Congress enacted the LMRDA to “protect the rights of rank-and-file members to participate fully in the operation of their union through processes of democratic self-government and, though the election process, the keep the union leadership responsive to the membership.”<sup>15</sup> Likewise, the CSRA requires “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.”<sup>16</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 3.

<sup>13</sup> D. & O. at 7–8.

<sup>14</sup> *Morris v. Hoffa*, 361 F.3d 177, 186 (3d Cir. 2004).

<sup>15</sup> *Wirtz v. Hotel, Motel & Club Emps. Union, Local 6*, 391 U.S. 492, 497 (1968).

<sup>16</sup> 5 U.S.C. § 7120(a)(1).

In the circumstances of this case, we do not believe deferring the remedial election would serve the purposes of guaranteeing, and promoting confidence in, free, fair, and democratic elections and governance in labor organizations. Deferring the remedial election would ensure the incumbent serves at least eight additional months, constituting nearly one-fourth of the position's full term.<sup>17</sup> During this period, the incumbent could further entrench in the position and would continue to direct the union's affairs under the cloud of the tainted election and LMRDA violation.<sup>18</sup> Delaying the remedial election also risks granting the incumbent the inherent power, through the imprimatur of the office to which the incumbent may not be entitled, to influence the next election, not only for the office of President, but also for other offices and positions on the ballot.<sup>19</sup>

While it may be the case, as POPA suggests, that it could benefit from OLMS's supervision of its next regular election of a full slate of officers and delegates, we do not believe that benefit sufficiently detracts from or outweighs the need to promptly remedy the LMRDA violation.<sup>20</sup> As OLMS suggests, to the extent POPA believes OLMS's assistance with the next regular election will help ensure compliance and promote the purposes of the LMRDA, POPA may request such assistance through OLMS's Local Election Advisory Program.<sup>21</sup>

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<sup>17</sup> The timing here distinguishes this case from the decision of the Fifth Circuit Court of Appeals in *Donovan v. Local 10902, Communications Workers of America*, 650 F.2d 799 (5th Cir. 1981), cited by POPA in its Motion. Motion at 2. In *Local 10902*, the union's next regular election was scheduled to take place from September to December 1981, just two to five months after the Fifth Circuit issued its decision. See 650 F.2d at 802. Given this short time horizon, the Fifth Circuit determined that the LMRDA's requirement that a remedial election be held would be satisfied by having the impending regular election supervised by the Secretary of Labor. *Id.* In contrast to *Local 10902*, the next regular election here will not occur until a year after the issuance of the D. & O., and eight months after the interim, remedial election ordered by the Board. Cf. *Chao v. Local 54, Hotel Emps. & Rest. Emps. Int'l Union*, 166 F. Supp. 2d 109, 125 (D.N.J. 2001) (distinguishing *Local 10902*, and concluding that the union's "next regularly scheduled election in June 2002, more than 8 months away, would [not] satisfy the express remedial provisions of the LMRDA.").

<sup>18</sup> See *Hotel, Motel & Club Emps. Union*, 391 U.S. at 503 ("Congress designed Title IV [of the LMRDA] to curb the possibility of abuse by benevolent as well as malevolent entrenched leaderships.").

<sup>19</sup> See *Int'l Org. of Masters v. Brown*, 498 U.S. 466, 476 (1991) ("The statutory guarantees [of the LMRDA] are specifically designed to offset the inherent advantage over potential rank and file challengers possessed by incumbent union leadership." (internal quotations and citation omitted)).

<sup>20</sup> See Motion at 3.

<sup>21</sup> See Complainant's Opposition to Respondent's Motion for a Temporary Stay of the Administrative Review Board's Remedial Order at 8.

**CONCLUSION**

For the foregoing reasons, POPA's Motion is **DENIED**.

**SO ORDERED.**

  
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**SUSAN HARTHILL**  
Chief Administrative Appeals Judge

  
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**THOMAS H. BURRELL**  
Administrative Appeals Judge