

REPORT OF THE PROTEST OFFICER

MEMORANDUM OF DECISION

Date: September 17, 2009

To: SEIU Local 221 Executive Board

From: Henry F. Murray, Esq.
Protest Officer

Re: Investigation and Decision
Election Protest No. SEIU221-2009-001

On July 27, 2009, member Monty Kroopkin filed a timely election protest with the Local 221 Election Committee complaining of various issues with respect to the mailing and receipt of ballots, the counting of ballots, the conduct of in-person elections and the activities of various local union members during the election campaign. On August 1, 2009, the Local 221 Executive Board, pursuant to its authority under the SEIU Local 221 Constitution and By-Laws, assigned the investigation of the election protest to the undersigned who has been designated the Protest Officer for this investigation and complaint. On August 3, 2009, Mr. Kroopkin's complaint was docketed as Protest SEIU221-2009-001 and acknowledgment letters were sent, via regular mail and email, to all of the interested parties and slates in the recently concluded Local 221 officer and executive board election. The Protest Officer, and his designees, conducted a thorough investigation into each of the protester's fourteen (14) separate allegations, involving witness interviews, submission of sworn affidavit and review of numerous documents. Set out, herein below, are the Protest Officer's findings of fact and conclusions of law with respect to each of the allegations followed by a Recommended Disposition for each of the allegations.

I. Background

In March, 2009, Merriman River Group (MRG) was retained by the Local 221 Election Committee and Executive Board, pursuant to authority provided in the SEIU Local 221 Constitution and By-Laws, to conduct the local's first officer and executive board election. In its role as the election contractor, MRG worked with the Election Committee on all aspects of the nomination and election process including announcements and mailing to the membership, reviewing nomination petitions, liaison with candidates and slates, mailing official election material and ballots, collecting voted ballots and processing and tabulating the results.

As part of its responsibilities, MRG prepared the membership mailing list and the list used in July, 2009 for determining eligible voters. The mailing list compiled was

used in all mailings to the membership whether to inform them of the nomination process, announce the election, to send candidate information and to mail ballots. The mailing list was prepared based on the membership data maintained by Local 221 reflecting members' employment and dues status as well as each member's last known address. The mailing list compiled by MRG consisted of all active members of the local union. All members of Local 221 are municipal or county employees covered, under each collective bargaining agreement, by dues check-off provisions. Each month Local 221 receives dues remissions from each employer along with updated lists of new members, dropped members and any changes such as addresses. This was the membership list from which MRG created the mailing list that it used to send out the notice of nomination and election, the ballot packets and the official candidate information booklet. For these mailings the total number of active members on the list was 7,138. This was also the same list provided to the vendor, Select Mailing, who was responsible for any mailings done by candidates at their own expense.

Nominations for office were conducted by petition. Candidate petitions required the valid signatures of twenty-five (25) members in good standing and were due by the deadline of May 23, 2009. Nominations were open for four (4) officer positions, three (3) local union committee chairs and nine (9) executive board positions representing various divisions within Local 221. At the conclusion of the nomination process five (5) executive board positions were uncontested. The election was held to fill the remaining twelve (12) officer and executive board positions including President, Vice-President, Secretary, Treasurer, Politics Chair, Member Organizing Chair, Social/Economic Justice Chair, the executive board position for Schools and the four (4) County executive board positions. Candidates were permitted to campaign and appear on the ballot as individual candidates or affiliated with a slate. At the conclusion of nominations there were 26 candidates running for office. These candidates were all affiliated with three slates – the Unity Slate, the Reform221 Slate and the Accountability Slate.

Ballots were mailed to members on July 1, 2009. 7138 ballots were mailed. This number represented the actual number of active members on check-off in the Local 221 membership file.¹ Voted mail ballots were due back at the post office box designated for the receipt of ballots no later than noon on July 21, 2009. 652 ballots were returned by the cut-off date. In addition, during the balloting period, 83 ballots were returned to the post office as undeliverable.² During the balloting period seven (7)

¹ The local union represents bargaining units throughout San Diego and Imperial Counties. Individuals, who chose not to become union members must, nonetheless pay an agency fee in lieu of union dues. Agency fee payers are not members of Local 221 and are therefore not eligible to vote in Local 221 union elections.

² An undeliverable ballot is returned to the original post office mailing box because, among other reasons, the address of the member is not accurate, the member has moved and left no forwarding address or because the forwarding period has expired. The number of undeliverable ballots is just over one (1%) percent of the number mailed. However, there were also 164 candidate information booklets returned as undeliverable

members requested and were mailed replacement ballots.³ Only the 652 ballots properly returned by July 21, 2009, were included in the vote count.

In addition to mail balloting, MRG provided several opportunities for in-person voting during the last week of the balloting period. From July 14 to July 21, 2009, MRG conducted in-person voting at 16 locations throughout the jurisdiction of Local 221. 96 members took the opportunity to vote in-person. A total of 748 ballots were cast.

Following the conclusion of in-person voting and the final pick-up of returned voted ballots, MRG conducted a tally of all votes. This tally and vote count was conducted on July 21, 2009. Voter eligibility was determined by their good standing status as of the date of the vote count. In determining voter eligibility, MRG obtained a list from Local 221 of 101 members who became inactive between the time the ballots were mailed and when they were returned. Any ballots returned from these individuals would be challenged during the envelope scanning process.⁴ During that scan it was determined that four (4) such envelopes had been returned. In addition, one (1) envelope returned by a member who had voted during in-person balloting was also marked as a challenged ballot since that member had already voted. Consequently there were 743 valid ballots cast in the election. During the vote count, candidates or their observers were present at all phases of the election process.

Following the vote count, MRG certified the results of the election.⁵ Pursuant to the Local 221 By-laws and Constitution, elected candidates are to be sworn-into office at the September, 2009 meeting of the Executive Board.

II. Protest

The protest filed on July 27, 2009 by Mr. Kroopkin, who was a candidate on the Reform221 Slate for President, alleged fourteen (14) separate complaints with respect to the conduct of the election or the conduct of other candidates or union officials. Each

in this same time frame. That is a return rate of about 2.2 %. There seems to be no clear reason why ballots and information packets addressed to the same location would have different rates of successful delivery.

³ MRG maintained a toll-free number that members could call to request replacement ballots. This number was publicized in all mailings, on the Local 221 web site and on the MRG website.

⁴ MRG utilizes a proprietary eligibility determination process whereby each member is assigned a unique random sequence number and corresponding barcode which is printed next to the member's name on the returned business reply envelope. The barcode is scanned by an MRG staff member and the computer monitor displays that member's file along with a code indicating whether or not they are eligible or ineligible to vote. The ballots of members showing an ineligible code are separated and marked as "Challenged" ballots for further resolution, if necessary.

⁵ The official certification is attached hereto as Attachment A.

protest allegation was separately investigated. Findings of fact and any appropriate or necessary conclusions of law, for each allegation, are set forth below. In each section, the actual protest is set out in indented bold italics.

1. ***Many members did not receive mail ballots, notice of election, and/or the candidate statements voter information booklet, which were supposed to be mailed to all members of Local 221. Many members who did not receive said election materials report that they have not changed their address and have received other mailings from SEIU Local 221, including a mailing done by the Unity Slate to campaign for this election. Mailings for candidates/slates were done by Select Mailing, using member name and address data provided by Local 221.***

The thrust of this protest is that there were significant problems both the accuracy of the local union's membership list and that significant numbers of members were, therefore, disenfranchised as a result. The Protest Officer's investigation did not substantiate those allegations.

As an initial matter the protester asserts, in documents provided with the protest, that that over 1200 local union members never received ballots and that this number is significant and could have affected the outcome of the election. It is clear from the investigation that the factual assertion with respect to the actual membership mailing is inaccurate. As is clear from the background information set forth above, the mailing list used by MRG contained 7138 names. That number represents the actual total of active Local 221 on dues check-off as of July 1, 2009. Therefore this was the list from which eligible voters was determined at the vote count.⁶ The accuracy of that number, and the underlying methodology relied upon by the local union and MRG to compile the list was verified by the Protest Officer during the course of the investigation. As was explained above, all local union members are on dues check-off with each of the employers with whom Local 221 enjoys a collective bargaining relationship. The local union receives a dues transmittal as well as a check-off list each month from each employer. These check-off lists are used by the local to compile its membership roster and determine, at any one time, the total union membership. In addition, such check-off information permits the union to determine whether any members are delinquent in their dues, for reasons not attributed to employer fault, for purposes of determining good standing status.

There maybe additional individuals in various bargaining units throughout Local 221's jurisdiction who are not union members but enjoy the benefits of union representation. These agency fee payers are not union members and not entitled to vote in union elections. Consequently, they could not be included in a mailing for a

⁶ In determining eligibility to vote on the date of the election, Local 221 adopted the presumption that a member on union dues check-off will not be penalized with respect to their "good standing" status because of the employer's failure to timely remit check-off monies.

union election. As of July 14, 2009 there were 1968 agency fee payers in Local 221's jurisdiction. In addition to these agency fee payers, a group of 930 individuals in the San Diego County Probation Officers Association were not included in the mailing to the membership because their bargaining unit had disaffiliated from Local 221 in January 2009. Another 90 individuals in a Craft Unit no longer pays dues to Local 221 but the Union still continues to represent them. These individuals are not members and were not included in the membership mailing. It is clear from the investigation that the number of union members eligible to participate in the election, as of the date the ballots were mailed was 7138.⁷

Only 83 ballots were returned by the USPS as "undeliverable" by the date of the election, July 21, 2009. Between July 22 and August 6, 2009, a two week period post-election, only one additional ballot was returned to the mailing post office box as "undeliverable." This number represents less than 1.1 % percent of the total number of ballots mailed by MRG in this election. In March, 2009 MRG had conducted a prior membership mailing in conjunction with a Local 221 by-laws vote. A list of members whose ballots were returned as "undeliverable" in that vote was provided to Local 221 so it could attempt to correct any "bad addresses" in anticipation of the election balloting to be held in several months. MRG officials indicated that the number of such "bad addresses" from the March mailing was significantly higher than those from the ballot mailing in July, as determined by the level of returned as "undeliverable." It would appear, therefore, that Local 221 made reasonable efforts during the pre-election period to clean up its membership list and correct it to reflect its members' last known mailing address. While it is unfortunate that some members did not receive ballots⁸ the local union's obligation, and derivatively MRG's obligation, was to make reasonable efforts to maintain an accurate mailing list and then to mail the ballots, as well as nomination and election notices, to its members' last known addresses. It appears that this is exactly what occurred.

The protest also alleges that several members did not receive their ballot packets

⁷ As explained in the Background section, on the date the votes were counted, MRG challenged, in its voter database used to determine eligibility, 101 members who had become inactive members between the time the ballots were mailed and the date of the vote count on July 21, 2009. In document supplied with the protest, Mr. Kroopkin asserts that the mailing list number is suspicious because the 2008 LM-2 filed by the local union lists 7,692 members. The number of members counted by the local union in December, 2008 for purposes of its LMRDA filing requirement is immaterial to the issue of the number of active members eligible to participate in the election in July 1, 2009. The protocol used by the local union and MRG to compile the list of active members was accurate and based on the current data available in the monthly check-off reports from each local union employer.

⁸ Members who did not receive ballots had an opportunity to request replacements. Apparently seven (7) members did so during the election period and were mailed duplicate ballots.

yet received other mailings. Documents provided with the protest also claimed that one member received her ballot packet but no candidate mailings. The inference that the protester wishes to draw from this information is that the mailing list was, in some measure, defective. The Protest Officer reviewed the list used in the mailing and the method used to compile the list from the data available at the time it was created. The Protest Officer found no evidence to support the conclusion that the list was inaccurate. Any wrong member addresses were within the percentage that could reasonably be expected to obtain in a membership of over 7000 members, despite the efforts of the local to correct bad addresses in the pre-election period.

The protest also raises an inference that there may have been different mailing lists used because some members received some material and not others. Based on the investigation, interviews with MRG, mailing vendors and Local Union officials responsible for supplying the lists, as well as a review of the data base and lists used in each of the mailings, the Protest Officer concludes that the exact same mailing lists were used for the sending out of nomination and election notices, the ballots, the official candidate information booklet and any separate candidate-financed mailings.

While it is possible that some members received some mailings and not others, that circumstance is not attributable to the actions of either the Local Union or MRG. Given the low rate of "returned as undeliverable" from the election mailing, it appears that Local 221, and derivatively MRG, fulfilled its obligation under the statute to mail material to each member's last known address. Moreover, MRG and the vendor employed for candidate financed mailings all used the same lists and mailed to the same members. Local 221 and MRG are not responsible for the failure of properly mailed material to arrive at an addressee's home. Once that material is mailed it is the responsibility of the U.S. Postal Service to see that delivery, if possible, is made.

The protester supplied the names of three (3) individuals that had difficulty with receiving either ballots or campaign material.⁹ Of the three individuals mentioned, two

⁹ The protester also supplied some additional evidence during the investigation that two other individuals did not receive the Notice of Nomination and election, a mail ballot packet or any of the mailed Candidate Statements. Charlene Demus is an active member of the local union but complained, in a signed statement submitted by the protester, that she received no mailings. Ms. Demus provides her mailing address as 7078 Deerhurst Ct., San Diego, CA 92139. The investigation revealed that this was the exact same address that appears on the mailing list used by MRG to mail the nomination and election notice, the ballot and the candidate statements to Ms. Demus. Although the address is both accurate and current the material apparently failed to arrive. The local union's obligation, and derivatively MRG's, is to mail to its member's last known address. In the case of Ms. Demus this is what they did. Another individual, Terri Goodwin, also submitted a signed statement to the protester making the same claims. The investigation revealed that Ms. Goodwin is employed as a Human Services Specialist at the HHS District Office in Lemon Grove, CA. The address she

of them, Jo Comer and GE Yang, are listed as union members with current mailing addresses. The investigation has determined that Comer and Yang appeared on each of the mailing lists used during the election period for all purposes including the ballot mailing, the candidate booklet mailing and all individual candidate-financed mailings. The address for each was the same on each of the mailing lists. The fact that they received some mail but not others is unfortunate but not attributable to any action or inaction on the part of Local 221 or MRG. Additional documents provided by the protester assert that Margarita Flores did not receive a ballot. Flores provided a signed statement to that effect as part of the protest submissions. Margarita Flores does not appear on the list of active Local 221 members used in this election. The investigation revealed that Ms. Flores, who may or may not be still employed by the San Diego County Jail, ceased paying union dues to Local 221 in May, 2008. Because she is delinquent in her dues for over 14 months, she was classified as an inactive member and was, consequently, not included in the mailing to active union members.

The protester also claimed in documents submitted at the time of the protest that that no members of the union working for the County Assessor in the San Marcos facility received any election material. The information on which this protest allegation is based is anecdotal and the protest does not include the names of individuals who allegedly received no election material. Without specific names of individuals it is not possible for the Protest Officer to determine whether or not certain people, or a class of individuals, were left off the local union mailing list. However, the investigation did reveal that members of the union working for the County Assessor in the San Marcos facility were included on the membership list used by MRG to mail nomination and election notices, ballots and candidate information. Again, the failure of those members to receive election material can not be fairly attributed to any omission on the part of MRG or Local 221.

One of the inference drawn from the material and documents submitted by the protester is the claim that members were unaware that an election was taking place because members did not receive mailings or other information about the election. As indicated in the Background material, above, prior to the mailing of ballots on July 1, 2009, MRG, conducted a series of mailings to the membership, starting in March, 2009¹⁰, regarding the nomination and election process. In early May, 2009, MRG sent a

supplied, 1604 Presiora Street in San Diego is the same address that appears in the Union records. However, Ms. Goodwin is not an active member of Local 221. She is an Agency Fee payer and therefore was not eligible to vote in the July 2009 election. As an Agency Fee payer, Ms. Goodwin receives yearly letters from Local 221 informing her that she is entitled to receive a rebate on her agency fee payments. The investigation revealed that Ms. Goodwin was sent such letters in both the fourth quarter of 2007 and the fourth quarter of 2008 by the Union. She therefore received regular and timely notices of her agency fee status. The Union was under no obligation to mail a ballot to a non-member.

¹⁰ The March mailing to members was a ballot mailing for ratification of its By-laws.

mailing to all active members on the Local 221 list informing them of the nomination and election. The notice informed members that nominations were open for officer and executive board positions and provided instructions on how to obtain and submit nomination petitions. This information was, in turn posted on both the Local 221 web site and MRG web page dedicated to the Local 221 election. The information contained in this mailing and web posting informed members when ballots would be sent out, how to request replacement ballots and that there would also be one week of in-person voting to supplement mail balloting. On or about July 1, 2009, MRG mailed both a candidate information booklet and the ballot packet to each member on the active membership list. The candidate booklet, in addition to containing a campaign page for each candidate and slate, also contained information about the times and locations for in-person voting and additional information regarding how to request replacement ballots if a member failed to receive one. In summary, the Protest Officer found that the Local 221 membership received many separate mailings from MRG over a two month period of time alerting them to the entire nomination and election process.

In addition to the mailings to the membership by MRG, the local union posted notices regarding the nomination and election process in work sites throughout the union's jurisdiction. The local union also maintained all of the information related to the nomination and election process on its web site, including information on how to request duplicate ballots or vote in-person.

MRG maintained a separate web page for the SEIU Local 221 election as well as posting all information, and links, on the Local 221 web site. This MRG site included the nomination notice as well as job descriptions for each office and a downloadable nomination petition. The web site also included the election notice and information on obtaining replacement ballots and on how and where to vote in-person. Finally, the web site also contained the entire booklet with candidate and slate statements. MRG also instituted a series of "robo-calls" to every member on the local union mailing list in July, 2009, as part of a GOTV operation. The calls, made in July 2009, informed members that an election was underway and told them how to receive replacement ballots and how to vote in-person.¹¹ In addition, MRG placed specific "robo-calls" to each member whose ballot packet was returned to the post office box as "undeliverable" specifically informing them of how and where to vote in-person.

It is, of course, possible that there were some members in a local union with more than 7000 members spread out over two California counties who did not know an election for union office was taking place. However, any such ignorance on the part of those members that an election was underway cannot be attributed to any lack of effort on the part of MRG or Local 221 to inform the membership. The investigation revealed that both Local 221 and MRG took a great many steps to make the membership aware

¹¹ The local union membership list contained a high percentage of members who provided telephone numbers. The "robo-calls" were able to be place, the investigation showed, to over 86% of the Local 221 members..

that an election was taking place and to provide members with information on how they could meaningfully participate and vote. The Protest Officer found no plausible evidence otherwise. On the contrary, the investigation revealed substantial effort through mailings, workplace and internet postings and "robo-calling" to make members aware of the election. Despite these efforts only 10% of the membership participated in the process.

As a result of the investigation, the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

2. ***Merriman River Group prevented observers from observing the complete counting of the ballots.***

The investigation revealed that MRG counted ballots on July 21 by divisions, in reverse order of size, starting with Schools Division, followed by all uncontested divisions which shared a common ballot and then finishing with the Counties Division. A single counting station was utilized for the Schools Division and the uncontested divisions. Because the counties division comprised nearly 75% of the voted ballots returned, at some point MRG established a second count station for the processing of those ballots. The second count station was no more than three (3) feet from the initial station where observers from all three slates were seated. Matt Fitch, MRG's on-site manager, does not recall whether or not he formally announced the opening of the second count station but he does recall that when they began counting ballots at the second station, observers from at least two of the slates were present. Members of the Reform221 Slate observing at the first count station were unaware, according to both documents submitted with the protest and interviews conducted with Reform221 slate observers that the second count station had been opened. Interviews with the observers for both the Accountability and Unity Slates indicated that they observed MRG personnel setting up the second station and heard Fitch say that they would be counting ballots at the next table.

Denise Knobloch, a candidate and observer for the Reform Slate, soon joined the second counting station after the first 20 ballots were being reconciled by the count team¹². She asked to have the count done over. MRG refused to do so saying that observers were present during the count of those ballots and that the count would proceed.

Interviews with witnesses indicate that MRG did not prevent candidates or their observers from meaningfully participating in and observing the count of ballots on July 21, 2009. Moreover, a review of the count site records revealed that the first 20 ballots

¹² MRG follows the usual counting practice of reconciling the actual votes casts (including voids and over and under votes) after each bundle of ballots. In this case they used bundles of 20 ballots each.

processed by that counting team involved votes cast by members employed in the Counties Division. The closest vote cast in the Counties Division was for executive board member for Public Safety where the margin between the winning and losing candidates was 31 votes. Therefore, even if observers had not been permitted an opportunity to view the count of those 20 ballots, a conclusion the Protest Officer does not find, the votes of those 20 ballots would not have affected the final outcome of the election for any County office.

As a result of the investigation the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

3. *A member of the Election Committee violated neutrality and directly engaged in campaign activity against Reform221*

The thrust of this protest is that a member of the Election Committee, Linda Correa, removed campaign material from employee mail boxes at the Family Resource Center in Escondido. Since the material belonged to a particular slate, the allegation is that the Election Committee member was not neutral during the election because the campaign material of the Reform Slate was removed in this manner.

The protest investigation revealed that on or about July 8, 2009 member Doranna Bortz placed Reform221 Slate campaign flyers in some workplace mailboxes of her co-workers at the Family Resource Center in Escondido, CA. Later that same day, Ms. Bortz witnessed union steward and Election Committee member, Linda Correa, removing the flyers from the mailboxes. Ms. Correa explained to Ms. Bortz that she didn't have permission from the union to place the flyers in employee mailboxes so she was removing them. After removing the flyers from the mail boxes she discarded them. The investigation revealed that members of the Election Committee believed that it was against campaign rules to distribute election material in employee mail boxes because it was a use of employer resources for partisan political activity. The investigation further revealed that there was no other reported incident throughout the campaign of Election Committee members removing campaign material. However, the investigation did reveal that members of the Election Committee had, at various times during the campaign period, advised candidates and supporters not to place partisan campaign material in employee mail boxes at work sites.

If Ms. Correa believed that the flyers in the mail boxes was an impermissible use of employer resources she probably should have taken the time to find out who placed the flyers in the mailbox and ask them to remove them. By taking it upon herself to police the mailboxes, Ms. Correa unfortunately left herself open to charges that she was enforcing the rule against that particular slate and not acting neutrally. By the same token, Ms. Bortz who had distributed the material earlier in the day, made no effort to inform Ms. Correa that she was the one who had made the distribution even when she observed her removing the material. Whether it was wise or not for Ms. Correa to

remove the offending flyers is not the issue presented in this particular protest. The question is whether that action in any manner implicated Ms. Correa's neutrality.

While Ms. Correa may have been over zealous in her efforts to make sure that employer resources were not used in the campaign those facts, alone, do not call her neutrality into question. There is no fact discovered by the Protest Officer to indicate that Ms. Correa's actions were motivated by any partisan feelings or any animus to the Reform221 Slate. Rather, the investigation did reveal that she, and other Election committee members, did consistently advise members that employee mail boxes should not be used for distributing campaign literature.

As a result of the investigation the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

4. ***Union staff (on their paid time) introduced candidates at union meetings or allowed them to campaign during union meetings. These meetings were not called for the purpose of providing an equal forum for all candidates.***

The facts underlying this protest stem from a work site meeting held at the HHS facility on Van Houten Street in El Cajon, CA on Thursday July 9, 2009 between the hours of 12 noon and 1:00 p.m. Work site organizers Solita Kampley and Karen Paredes convened the meeting. Approximately 11 members were in attendance at this meeting. The investigation revealed that at some point during the meeting, Organizer Kampley turned the floor over to member Nico Portillo. Ms. Kampley was talking about the importance of contributing to COPE and Mr. Portillo, who is the COPE chair for the Local Union, interrupted her presentation to add his own information about COPE. As Ms. Kampley was reviewing documents in response to a member's inquiry regarding their COPE contribution, Mr. Portillo took that opportunity in the meeting to tell the assembled group that he was a candidate for office on the Accountability Slate and proceeded to ask for member support in the campaign and for other members of his slate.¹³ In addition, at some point, before Mr. Portillo left the meeting, he passed out some campaign flyers to the members in attendance.¹⁴ When Mr. Portillo¹⁵ finished,

¹³ There is some disagreement in the recollection of the participants in that meeting about what was said when Mr. Portillo began his campaign appeal. Mr. Rochfort alleged that Ms. Kampley knew what Mr. Portillo was speaking on when he began, after introducing him, and said "we can't be involved." Ms. Kampley recalled that when Mr. Portillo transitioned from his COPE talk to speaking about his candidacy she indicated to the members that "this is something we can't be involved with." Mr. Portillo recalled that Ms. Kampley said something when he began to speak about the union election but could not recall specifically what she said. However, there is agreement that he spoke about his candidacy immediately following his presentation on the COPE topic.

¹⁴ It is unclear from the recollections of the participants whether he did so following his brief presentation or while speaking.

and left the room, another member, John Rochfort, asked for the floor. Mr Rochfort was a candidate for Secretary on the Reform 221 Slate and happened to be in the facility by chance on that afternoon and had attended the work site meeting. Mr. Rochfort informed members that he was a candidate on the Reform221 Slate and told members who had not received a ballot to call in and ask for replacements. He further informed members that he did not believe it was proper to campaign during work site meetings so he would not do so. It appears that Mr. Richfort did not distribute any campaign material. After Mr. Rochfort concluded his talk the business part of the meeting continued.

Later that day, after learning of the incident from Kampley and Paredes, union official Susan Brondell sent an email to all Local 221 staff informing them of what occurred and instructing them that while candidates were free to campaign among members before or after such work site meeting, they were not to be permitted to address the members during a meeting. The investigation further revealed that the union staff members attending the work site meeting were unfamiliar with the campaign rules and believed that members could speak to each other about the campaign as long as the union did not endorse or participate in those discussions.

The investigation revealed no other occasions on which any union staff members permitted any candidates to address members during any work site meetings during the rest of the election period.¹⁶

The investigation further revealed that every work site meeting held throughout the campaign period was called for legitimate union business reasons and not for the purposes of permitting any candidate a forum in which to express their views.¹⁷ The work site meeting on July 9, 2009 was the only meeting at which there is even any arguable evidence that a union staff person was aware that a candidate was delivering a partisan message when called upon at the meeting. Upon hearing of the incident, the union issued an immediate email to the staff conducting such meeting instructing them that campaigning at such meeting was prohibited and that they had an obligation to see

¹⁵ Mr. Portillo was an unsuccessful candidate for Politics Chair of the local union losing to Michael Dobbins by 108 votes.

¹⁶ From July 9, 2009 to and including July 21, 2009 (the day ballots were counted), Local 221 held approximately 40 additional work site meeting throughout its jurisdiction.

¹⁷ The investigation further discovered one other instance in which a candidate attempted to stand up at a work site meeting to urge members to vote in the election but that effort was cut short by another candidate objecting to that GOTV message being delivered at such a meeting. There is no evidence that in that meeting the union staff person had any idea that the candidate was going to deliver such a GOTV message when they were called upon to speak. However, merely urging members to participate in the election absent a partisan appeal for their support is not, in the judgment of the Protest Officer, a violation of the election rules. Such a GOTV appeal is akin to Mr. Rochfort's reminder to members to call in for replacement ballots.

that the prohibition was enforced.

Where a union permits some candidates to use union resources, such as a work site meeting, for partisan purposes without allowing such activity by other candidates or supporters, or fails to communicate to those other candidates that such partisan activity is permissible during these meetings, it commits a violation of union election rules.

Here a member of the union used the opportunity of a worksite meeting to address the membership for a partisan political reason. The Protest Officer credits the recollections of both Ms. Kampley and Mr. Portfillo that Mr. Portfillo did not inform the work site organizer prior to speaking that he would use the opportunity to campaign during the business portion of the meeting. However, once Mr. Portfillo began to campaign, Ms. Kampley should have interrupted him and returned the meeting to the agenda. Although Ms. Kampley did not do this, the violation of permitting Mr. Portfillo to continue to speak appears both unintentional and was clearly *deminimus*. Moreover it occurred only one time during the election period and the meeting in which it occurred was attended by very few members.¹⁸ While it appears that Mr. Rochfort did not specifically campaign during that meeting, he nonetheless introduced himself to the assembled members as a candidate and apparently had equal access to those members during the meeting if he wished to deliver a partisan campaign message.¹⁹ Importantly, once the union heard of the problem it took swift and immediate action to prevent another occurrence.

As a result of the investigation, the Protest Officer concludes that despite the events that occurred at the work site meeting on July 8, 2009, there is no substantial basis to challenge the conduct of the election based on these facts and the allegations contained in this charge.

5. ***Candidate Omar Lopez distributed Unity Slate campaign literature during work time at his building.***

Additional documents provided with this protest alleges, in more detail, that candidate Omar Lopez campaigned at his work site on July 16, 2009 during non-working hours handing out literature to members in their cubicles. The inference that the protester wishes to draw is that if Mr. Lopez was permitted to campaign on non-working time this would be an impermissible use of employer resources and a violation of election rules.

¹⁸ Since only 11 county employees attended this meeting, whatever appeal was made by Mr. Portfillo could not have affected the outcome of the election for any county executive board position. The smallest margin of victory for offices in the County was 31 for the position of executive board member for Public Safety.

¹⁹ It is at least arguable that the only slate aggrieved in this incident was the Unity Slate which filed no protest with respect to this incident.

The protest investigation revealed that Omar Lopez, at the time a Protective Services Supervisor at the HHS National City Office, distributed campaign material to several of his co-workers during his morning break on July 16, 2009. The break took place at 10:40 am and lasted for approximately 10 minutes. During the break Mr. Lopez dropped campaign literature on his co-worker's chairs or left it in their work cubicles or handed it directly to them. Following the distribution of literature and the end of his break, Mr. Lopez returned to his duties. At the time he took his morning break, Mr. Lopez marked the tracking board with the entry "Out" to indicate that he was on break. After returning from break he marked the board "In."

The protest investigation revealed that in addition to an unpaid lunch break, Mr. Lopez was entitled to two 10 minute breaks during the course of the work day. One of these was typically taken in the morning and the other in the afternoon. Unlike the lunch break, these ten minute breaks were not taken off the clock. They were paid breaks. However, whether or not a break, or even a lunch period, is compensated or uncompensated by the employer, does not determine whether or not an employee can use that period of time for personal purposes. What matters in the analysis is whether the break period was considered non-work time. The investigation revealed that such breaks, although paid by the employer, are considered non-work time and the employee's time to spend as they see fit. Therefore, even though Mr. Lopez distributed material on his break time that was paid by the employer, that time was considered his own time and not "worktime."

As a result of the investigation, the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

6. ***The incumbent president, Sharon-Frances Moore, was a candidate for election. During the campaign period, she used employees of the SEIU Member Resource Center (call center staff) to contact all Local 221 stewards to arrange individual meetings with herself, purportedly to discuss plans for San Diego County Board of Supervisors elections in 2010. Ms. Moore has not ever previously sought such meetings with all stewards, on any subject, during her entire term of office, from 2007 until now.***

The protest asserts that candidate Moore used union resources to promote her candidacy by instructing employees of the member Resource Center (MRC) to arrange meetings for her with individual stewards during the election campaign.

The investigation revealed the following facts. Local 221 maintains a MRC which is essentially a call center. The major purpose of the MRC is to field telephone inquiries from members regarding problems they are having on-the-job, recording grievances, answering questions regarding benefit entitlement or insurance programs and getting member problems funneled to the appropriate union staff person for resolution. The MRC is also used by local 221 as an outreach tool to notify the local union leaders and stewards about important events, training classes or provide current updates on important issues. In addition to these activities, the MRC has also placed calls to

stewards and union leaders to alert them to immediate issues or ask for their support on a timely matter, such as legislation or contract issues. For example, in January and February 2009 the MRC called members and stewards about the by-laws membership meeting. In March, 2009, the MRC contacted county stewards about the contract campaign to extend the county contract for two years. In April, 2009, the MRC placed calls to county stewards and county negotiating committee members about planned county lay-offs of members and the union's plans to combat the lay-offs. When MRC staff places these types of calls they work from a script that provides the important information the union wants the member or leader to learn.

As part of its effort to secure a better collective bargaining agreement for county workers, the union has supported the efforts of two active union members, Margaritte Johnson and Allison Barkley, who have circulated a petition for a ballot initiative that, if passed, would limit the term of office of county supervisors. As part of the union's support for this political effort, it planned to roll out a public relations campaign to support the ballot initiative. It hoped to put the campaign in place and announce it or go public sometime in mid-July, 2009. As part of the plan to build support for the union's political posture on the ballot initiative, and support for its contract campaign around the 2011 county contract, union president Sharon-Frances Moore decided to contact the rank and file leaders in the county bargaining unit about these events. She requested that the MRC call each of the approximate 200 stewards in the county bargain unit as well as the approximate 50 members of the county negotiating committee to advise them of the upcoming campaigns and ask to meet with them, if they had questions, in the period before the mid-July deadline for going public with the term limit ballot initiative. The calls were placed in a seven (7) day period from June 15 to June 22. Of the approximate 260 members contacted, six (6) requested meetings with Moore.

Union resources may not be used to promote or oppose the candidacy of any person for union office. This includes the use, by union staff or officers, of union paid time or union resources, such as the MRC, for partisan campaign activity. However, the work of the union does not stop simply because an election campaign is taking place. Union staff and officers, whether they are candidates or not, are expected by the membership to continue to carry out their duties and carry out union business despite the existence of the election campaign. In the current case, the union was embarking on a major initiative, support for term limits that it was linking to its campaign for a new county contract in 2011. As part of that initiative, the leadership of the local made a decision to inform and involve the rank and file leadership of the union working in county bargaining units. The involvement of the MRC in contacting those leaders appears to be a legitimate use of union resources for non-campaign purposes. There was no evidence produced in the course of the investigation to show that the calls made by the MRC were for campaign purposes or that the calls and requested meetings were not for legitimate union business but for the purpose of campaigning. Indeed a review of the scripts used by the MRC staff demonstrated that there was no partisan campaign material included in the script. The fact that Moore is a candidate for office does not restrict her from carrying out her job duties. Further, it is not a violation of any campaign

rules or guidelines if, in the course of carrying out legitimate union duties, Moore obtains "name recognition." As long as Moore has not used union resources for campaign purposes, she commits no violation.

As a result of the investigation, the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

7. ***Ms. Moore refused to give steward and candidate Denise Knobloch a copy of the same steward roster used to make the call center calls to stewards, until after the election.***

Statutory provisions permit union members to review the list of members during the period prior to the mailing out of ballots. Members may also be entitled to copies of any other lists that the local union staff or incumbent officers may have compiled during the course of their duties if those lists are used for campaign purposes. The underlying assumption in this protest is that candidates were entitled to a copy of the steward list that was used by the MRC to place calls to county stewards since that list was used, as alleged in Protest No. 6 above, for partisan campaign purposes.

Unions are entitled to restrict access to its membership, leadership and stewards lists in order to prevent these important union assets from being misused or exploited for commercial purposes. The investigation into the protest revealed that the steward list requested by Ms. Knobloch was not a list that was given out, in the past, to union members or union stewards as a routine matter. The investigation further concluded that the calls placed by the MRC to county stewards was not for partisan campaign purposes but for legitimate union business and the six (6) meeting that were arranged as a result of those telephone calls were for legitimate union business. Since the list, which is a union asset, was not used for campaign purposes, neither Ms. Knobloch, nor any other candidate, was entitled to the list to use for their campaign purposes. Consequently Ms. Moore was under no obligation, based on the historic use of the steward list and the fact that it had not been used for campaign purposes, to provide that list to Ms. Knobloch. The fact that Ms. Moore chose to release the list following the end of the campaign seems an appropriate attempt to ensure that the list was not used for campaign purposes.²⁰

As a result of the investigation, the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

8. ***The incumbent president, and candidate for election, Ms. Moore, campaigned at work***

²⁰ The fact that Knobloch requested the list as a result of the legitimate MRC telephone calls made about the county contract campaign and term limit issue (See Protest 6, above) may have caused Moore to be concerned that the list might be used for election purposes.

site union meetings (during her paid work time?). She spoke about her accomplishments and goals as president.

Union resources may not be used to promote or oppose any candidate for office. Therefore when a union staff member, or officer, is on paid union time that staffer or officer cannot use that time for partisan campaign purposes. By the same token, the business of the union does not come to a stop during the time period of an election and union staff and officers may continue to carry out their responsibilities as long as, in doing so, they do not use union resources, such as union paid time, to campaign. The issue presented by this protest is whether or not Ms. Moore, the incumbent president, was campaigning on union time. More specifically, the protest alleges that even if Ms. Moore took no overt action to campaign on union time during this particular work site meeting, the fact that she had not previously attended such meetings but was doing so now in the middle of an election campaign, should be deemed partisan activity and an impermissible use of union resources.

The investigation revealed that the Union employs approximately nine (9) worksite organizers whose job it is to conduct onsite meeting, at members' work areas on a daily basis. Typically such meetings occur during the workday usually during a scheduled lunch break. The local union schedules between 40 and 50 of these type meeting each week throughout the jurisdiction of the union. Over the course of the year the local union holds over 1000 to 1500 work site meeting. These meeting provide an opportunity for the local union to communicate important information to the members and help in mobilizing members for political and collective bargaining campaigns. These meetings also provide an opportunity for members communicate with the union, complain about matters of concern, and discuss work place issues and grievances. Typically such meetings draw from 10 to 20 members for each meeting.

Since becoming interim president of the local union in 2007, Ms. Moore has regularly attended these work site meeting. She attends those meeting where she has been specifically requested by members or the workplace organizer and she also attends work site meetings based on her schedule and availability. Sometimes her presence at a meeting is announced and sometimes it is not and she just attends. Her assistant, Ms. Bacon, reviews the monthly list of work site meetings and schedules Ms. Moore to attend as many as possible. A review of the procedures in place for at least the last 18 months substantiates that such scheduling is a regular and normal part of Ms. Bacon's job duties.

In supplementary material supplied with the protest, the protester specifically complains about a work site meeting held on June 18, 2009. Ms. Moore was asked to attend that work site meeting by the organizer to discuss, among other things, a particular problem involving a sexual harassment issue involving a worker at that site. At that meeting, Ms. Moore responded to questions and problems brought up by members attending that meeting, including the fact that they were unhappy with the staff person assigned by the union to their bargaining unit. The protester states that Ms.

Moore had never been to a work site meeting at that facility before and that at the meeting she "acted like a candidate." The protester infers that Ms. Moore was impermissibly campaigning on union paid time.

However, there is no factual basis presented to substantiate such a charge. No evidence was produced in the course of the investigation that Ms. Moore actually campaigned at this meeting. Campaigning would have consisted of an overt partisan appeal soliciting the members for their votes or distributing campaign material. The investigation showed that none of that occurred. The investigation revealed that Ms. Moore's attendance at that meeting was part of her normal duties as president. Whether she had ever been to that particular work site in the past at a work site meeting is no indication that her attendance was for the purposes of campaigning. Facts uncovered in the investigation substantiates that she attended many work site meetings over the past 18 months and that she attended this meeting for the purpose of carrying out here job as interim president and engaging in the conduct of union business. There is simply no evidence to the contrary.

As a result of the investigation, the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

9. ***Evidence indicates the Merriman River Group was not neutral toward all candidates. The rule against campaigning at the polls within the designated election zone was arbitrarily and improperly applied, making it impossible to leaflet or talk to voters entering the poll, at a reasonable distance from the poll. A public sidewalk was held to be in the no campaigning zone.***

Unions, or as in this case, their election agency, have the right to promulgate reasonable rules to govern the conduct of voting and campaigning on the date and time and at the location of in-person voting. Such rules are historically designed to protect the integrity of the polling site and permit voters the opportunity to cast ballots without being subjected to partisan campaigning or intimidation. The use of a rule prohibiting partisan campaigning within a certain distance of the polling location is both customary and expected in union elections. A rule prohibiting campaigning within 50 or 75 feet of the polling station is not unusual. In fact MRG, as the election agency for Local 221, promulgated such a rule and distributed it to all candidates and slates at a May 30, 2009 "Candidates Meeting."

The protest alleges that the rule promulgated and enforced with respect to the Local 221 in-person voting locations was "arbitrarily and improperly applied" by MRG. The Protest Officer construes the protest to be a claim that: (1), the rule itself was unreasonable since the no-campaign zone at the particular location mentioned made it difficult to communicate with voters, and (2), that MRG applied the rule in a discriminatory manner against certain candidates.

The purpose of maintaining a polling area free from partisan campaign activity has long been recognized as necessary, in both union and civil elections, not only to prevent voter intimidation but also to maintain order and decorum within the polling area. Such a rule promotes free elections and un-coerced voter choice. Posting an area outside of the polling area beyond which campaign activity is permitted, however, also allows voters an opportunity to hear partisan messages on their way to vote and permits candidates an opportunity for last-minute voter persuasion.

The protest, in documents accompanying its submission, specifically complains about the in-person voting location at the Local 221 union office on the last day of voting, July 20, 2009. At the Local 221 union office, the voting location placed some necessary limitations on the location of the campaign-free zone. The investigation revealed that the polling station was located in a mid-sized conference room inside the Local 221 office. The door to that conference room is located approximately ten feet from the front entrance to the building. The front entrance to the building is only fifteen feet from the roadway. As a result, MRG determined that in order to maintain the appropriate 75 feet campaign-free area from the polling station, the prohibited area had to run laterally, along the sidewalk, to the edge of the building and into driveways on both sides of the building. The area posted by MRG was approximately 75 feet from the polling station. As a result of that posting, candidates or their supporters had to station themselves along either side of the building in order to pass out literature or speak with prospective voters. The fact that a public sidewalk may fall within the prohibited campaign area does not make the rule unduly restrictive or unreasonable. The fact that the location of the 75 feet boundary may make it more difficult to communicate with or distribute literature to members on their way to vote also does not necessarily make the rule unreasonable. The location of the campaign-free area, at that location, may have been inconvenient for those individuals wishing to engage in partisan activity but just because it is convenient does not make the rule unreasonable. MRG had previously announced that intended to post the no-campaign area between 50 and 75 feet from the polling location. It did so in this particular location. The Protest Officer finds that enforcing that rule at the Local 221 polling site is not arbitrary or unreasonable.

The fact that a rule may be reasonable, however, does not prevent it from being challenged if that rule is arbitrarily enforced or its enforcement discriminates against some candidates and not against others. In such a case, and if facts so demonstrate, arbitrary and discriminatory enforcement of the rule would be an election violation. The Protest Officer found no such evidence, however, in the course of the investigation. Interviews with MRG staff assigned to the in-person voting showed that on other occasions, and at other locations, the 75 feet rule was uniformly enforced. For example, MRG staff member Luke Henrici, who was in charge of the Local 221 polling location on July 21, 2009, reported that on at least one other day he had been asked about the permissible campaigning area and had informed the candidate that it was 75 feet from the polls and pointed out the boundary to the candidate. This occurred at the El Cajon site and the candidate involved, he recalls, was Diane Cates (Accountability

Slate candidate for Counties-Public Safety). There is simply no credible evidence that MRG did anything other than neutrally enforce a reasonable rule prohibiting campaigning within 75 feet of the polls.

Based on documents accompanying the protest, the complaint here can also be reasonably construed to infer that candidate Knobloch was treated differently than other candidates because she was asked to identify herself at the time she inquired about the no-campaign zone and because MRG provided her with the instructions regarding the location of the 75 foot boundary only after placing a telephone call to others higher up in the MRG organization. There is disagreement among the witness statements about whether or not Knobloch was asked to identify herself before or after the telephone call was placed. MRG staff reported that they informed Knobloch of the 75 feet rule prior to placing any telephone call. Further, MRG staff stated that the telephone call to an MRG supervisor occurred only after Knobloch asked if the 75 feet rule was in writing. Knobloch was unsure whether the call occurred before or after she was asked to identify herself. The MRG staff person to whom Knobloch spoke (Henrici) called, after Knobloch asked, to inquire of his supervisor whether the rule was in writing. When he was told it was not, he was instructed by his supervisor to write the rule out on a piece of paper and provide it to Knobloch. Henrici then asked one of the other poll workers to go outside with Knobloch to show her where the 75 foot boundary would be located. It is correct that Knobloch was asked her name and whether or not she was a candidate. That request was made, however, pursuant to the established MRG procedure that all activity at the in-person sites be recorded in a logbook. After Knobloch left the polling site, Henrici made an entry in the logbook about the conversation. There is simply no credible evidence that MRG treated Knobloch any differently than it treated other candidates in similar situations.

As a result of the investigation the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

10. ***Voter privacy at the polls was not protected adequately; poll workers could see a table where ballots were being marked and see how a voter was voting.***

Based on documents provided with the protest, the complaints here center solely on the polling station at the local 221 union office on July 20, 2009. The investigation into this protest revealed the following information. The balloting at the Local 221 union office was held in a large conference room. The dimensions of that conference room were approximately 20 feet by 25 feet. Throughout the conference room there were several tables and chairs set up at some distance from the voter check-in station and the ballot box. After checking-in at the registration table, voters were provided with a paper ballot, told to mark their choices and then deposit the ballot in the ballot box as they were leaving the room. MRG staff at that polling station did not inform voters that they had to mark their ballot at any one location. Some voters chose to mark their ballot quickly, near the registration table, then deposit their ballot and leave. Other voters

went to locations and tables in the room at some distance from the registration area in order to mark their ballots. During the course of the voting day at the Local 221 office, MRG staff could not recall any time that there was more than one voter in the polling place at a time. A review of the MRG registration data confirms this recollection,

In supplementary documents the protester alleges that two voters, Diane Knobloch and Denise Sabeghi were uncomfortable that they marked their ballots in full view of MRG staff and, as a consequence, their right to a secret ballot was compromised. However, the investigation revealed that voters had the opportunity to go to tables and chairs in that conference room that were distant from the registration area to mark their ballots. Some voters chose to use this opportunity, others, apparently, did not. As long as an opportunity was provided for a voter to mark their ballot in secret, the Local Union and MRG met their statutory obligation.

As a result of the investigation the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

11. ***Some voters and some candidates were subjected to intimidation during the nomination process and/or during the campaign period.***

The protest alleges that members were subject to intimidation during the election process. In making such an allegation, a protester has a responsibility to bring forth evidence that such intimidation occurred and that the intimidation, if it occurred, affected the election in some manner, such as evidence that as a result of the intimidation members refraining from campaign activity on behalf of or opposing candidates for office, refrained from voting or were fearful of voicing their political preferences openly for fear of some retaliatory conduct. The protester has brought forward no such evidence.

In documents provided with the protest, it is alleged that a member who was subordinate to candidate Lopez felt pressure to sign his election petition. The individual alleged that if people subordinate to Lopez did not sign his petition they "suffer." Despite repeated attempts to contact this individual by telephone and email, no investigatory interview was able to be performed. There was no other evidence supplied by the protestor of intimidation, threats or improper pressure by Lopez to get individuals to sign his petition. Consequently there no evidence to support an inference that Lopez employed intimidating pressure to get members to sign his petition or retaliated against members who did not sign his petition. The fact that Lopez requested a member of Local 221, eligible to sign a nominating petition but also subordinate to him at work, to sign his petition is not, in and of itself, evidence of improper or intimidating conduct. While an employee in a subordinate position at work to a candidate for office may feel uncomfortable in refusing to sign the candidate's petition, that fact alone, is not evidence that Lopez engaged in any intimidating conduct toward that employee. It is a fact in public sector employment that in some collective bargaining units individuals

holding supervisory positions are in the same bargaining unit as non-supervisory employees. Whether this is advisable or not is beyond the scope of the Protest Officer's responsibility. However, there was no evidence provided that Lopez pressured or otherwise intimidated any individuals into signing his petition. Moreover, Lopez, although only required to submit nominating signatures from 25 members, submitted a petition with approximately 250 signatures. There is simply no evidence of any intimidating conduct on the part of Lopez.

In accompanying documents, the protest also alleges that a candidate on the Reform Slate, Denise Knobloch, was threatened by a member named Robert Insunza. The alleged threat consisted of an email from Insunza to Knobloch promising to "destroy" her slate and instructing her not to step on his toes. The investigation revealed that Knobloch was upset with Insunza's statement but, by her own admission, the statement, made 17 days before the close of voting, did not cause her to refrain from any campaign activity on behalf of herself or her slate. Moreover there is no evidence provided by the protester, Knobloch or others that Insunza engaged in any overt activity of threatening or intimidating members to either support candidates or refrain from supporting candidates for office.

The investigation revealed that Insunza did in fact send the email in question to Knobloch and that it was sent in response to a long email from Knobloch earlier that day. Insunza had apparently communicated, on his day off and from his home computer, with Monty Kroopkin at the email link on the Reform221 Slate's web site. Insunza's email was a commentary on the Reform221 Slate platform and Insunza offered his own views on each of the slate's platform positions. In the closing paragraph, Insunza tells Kroopkin that he would not vote for anyone on the Reform221 Slate and further takes issue with Kroopkin's complaints about Candidate Sharon-Frances Moore's activities as the Interim President. Insunza counsils Kroopkin, in his email, to calm down and "chill out" and take medication, if necessary.²¹

It was this email to Kroopkin that Knobloch answered. In that email to Insunza, Knobloch continued to cite specific reasons she opposed candidate Moore and complained that the SEIU was "going after other unions" and was acting in a "Mafia mentality." She further complained that Insunza's comments about the Reform Slate were insulting and then specifically chided him for telling Kroopkin that he should take Lexapro concluding that he wasn't a doctor and would not want to see him "get in trouble for malpractice." This was the context within which Insunza's comments about "destroying" the Reform Slate occurred.

It is foreseeable that in the midst of a union political campaign members will engage in spirited and sometimes heated exchanges expressing their preferences

²¹ Although Insunza's email does not use this language, in an investigatory interview Insunza stated that was his intent. In his email he mentions the psychotropic drug Lexapro which he claims has "does wonders" for him.

among the candidates and slates. Historically such dialog occurred while passing out leaflets or making soapbox speeches. The internet has expanded the reach of political dialog and it occurs, as here, on blogs and in email exchanges between members holding opposing view points. Such freedom of speech is protected by both statute and the First Amendment. Speech that threatens or intimidates voters in the exercise of their rights may well have a chilling effect on an election and could affect the outcome of the process and be a violation of election rules.

Here, however, there is no evidence of anything more than a heated exchange between bitter political rivals. The Insunza comments occurred in the midst of such an exchange. While Knobloch obviously took exception to Insunza's comments those comments were made in the context of a continuing political dialog and after Knobloch, herself, made comments suggesting that Insunza may face civil liability for suggesting that Kroopkin take medication. Beyond this exchange there is simply no evidence that Insunza engaged in any threatening or coercive conduct of any kind.²²

The protester also alleges that the Union's president, Ms. Moore, should have intervened in the exchange of emails between Knobloch and Insunza and taken steps to restrain Insunza's speech. Ms. Moore declined to do so indicating that it was not the Union's role to mediate exchanges between individual members. The Protest Officer finds that Ms. Moore's position to have the Union remain neutral in political exchanges between members was proper under the circumstances.

As a result of the investigation the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

12. ***Candidate access to inspect the Local 221 membership list was arbitrarily limited to appointments on 2 specified dates.***

It is clear that candidates for union office have the right to inspect the union's membership list in the period prior to any election. 29 CFR §§ 452.71, 452.72. In providing for the exercise of that right a union can promulgate reasonable rules that do not unduly interfere with such inspection. Specifying certain times and dates for the inspection or that the inspection take place while a union official or employee is present are such reasonable rules provided that they are not arbitrary or discriminatorily enforced. In addition, where a candidate has requested the right to inspect the list at another time or on another date, other than those specified by the union, and there is no

²² There is evidence provided by the protester in the form of email exchanges with Union officials that indicate Knobloch attempted to get the Union involved beyond her request to Moore. She asked one Union official whether Insunza's comments to her should be reported to "the county." As Insunza is a San Diego County employee the inference to be drawn from Knobloch's request was that she wanted Insunza to face some employment consequence for his email comments.

reason such a request cannot be accommodated, a union's refusal to do so may well be held to violate the statutory rights of a candidate.

Here the investigation showed that MRG informed candidates that the Union would set aside two dates, June 12 and June 13, on which candidates or their representatives could inspect the "mailing list." As set forth in more detail in the Background section, above, the "mailing list" used by MRG and reference in the May 30 communication with the candidates, was identical to the Union's "membership list" inasmuch as the mailing list contained the names and current addresses of all 7138 active union members. While it is unfortunate that MRG used the wrong nomenclature in its May 30 letter, the Protest Officer's review of the documents and the data bases indicates that the mailing list provided to candidates for review and the union's membership list are one and the same.²³

The investigation revealed that two candidates or slates exercised their rights and inspected the list. Eric Banks did so, on behalf of the Unity Slate, on June 12 at 5:00 p.m. Diane Sebeghi, on behalf of the Reform Slate, did so on June 13 at 3:00 p.m. There were no other requests for inspection of the list received from any other candidates or slates. The investigation revealed that no candidate or slate requested any alternative dates or times.

In accompanying documents, the protest alleges that the right to inspect the list was "nullified" by its limitation to two days set forth in the May 30 letter to candidates. If there was evidence that candidates had requested other times and dates on which to inspect the list and such requests were denied by Local 221 or MRG there may well be an argument that the times established by the union did not provide a meaningful opportunity for the exercise of the statutory right to inspect the membership list. However, no evidence was provided during the investigation showing any such requests or any such denials by the union or MRG.²⁴ Absent such evidence it must be presumed that those slates who wished to inspect the list asked for and were provided such an opportunity.

As a result of the investigation the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

13. ***A candidate was told by an election official that the right to inspect the membership list did not include the right to make any notes.***

The statutory right to inspect the list does not include the right to copy the list but

²³ The only names of bargaining unit members not on the union membership or mailing list were the names of agency fee payers ineligible to vote.

²⁴ Moreover, it should be noted that the protesters slate, the Reform Slate, actually did review the membership list.

does include the right to compare the list to another list or to notes belonging to the candidate. A union may take reasonable efforts to protect the integrity of its mailing lists from being copied during the inspection process including having the review take place in the presence of union staff or employees or prohibiting the taking of notes. A union must, however, permit a reviewer to compare the membership list with a list the reviewer brings with him or her to the review.

The protester alleges, in supplemental documents, that because candidate Diane Sabeghi, who inspected the membership list on June 13, was denied the right to take notes, her right of inspection was "rendered useless". The investigation revealed that candidate Sabeghi was indeed told she could not take notes. The investigation also revealed that candidate Sabeghi did not take her own list or any notes with her to the inspection.

Had the union prohibited Sabeghi from comparing the list with her own list or her own notes, it would have infringed on her statutory right of inspection. However, prohibiting the taking of notes as a means to protect against unauthorized copying of membership information is not unreasonable nor does it infringe on any candidate's right to inspect the list.

As a result of the investigation the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

14. ***Candidate Omar Lopez has fraudulently run for office.***

The Constitution and By-laws of SEIU Local 210 sets forth both the qualifications for membership in the local as well as those for nomination and election to an officer or executive board position. In order to be a member of Local 221, a person must have an employment relationship with an employer that has a collective bargaining agreement with the local union.²⁵ Moreover, in order to be considered in good standing a member must have paid her/his full dues before the last day of the month in which they are due.²⁶ Article IV, Section B (1) further provides that only those individuals who are employed by an employer under the jurisdiction of the local union are eligible to hold elected office in the local. Such individuals have the status of "members" whereas those individuals designated as "affiliates" or "retires" do not have the right to run for or hold elected office.²⁷ Article VIII, Section 2 (D) requires that a member have two (2) years of continuous good standing in Local 221, immediately preceding nomination for office, in order to be eligible to be nominated and run for an officer or executive board position.²⁸ Article VIII further specifies that upon election, a successful candidate shall

²⁵ Article IV, Section (B)

²⁶ Article IV, Section (A) (1).

²⁷ Article IV, Section (B); Article VIII, Section (3) (G)

²⁸ The Local 221 By-laws further state that in addition to these criteria, candidates must

assume office at the next Executive Board Meeting of the local union.²⁹

In documents filed with the protest, the protester alleges that Lopez knew prior to the ballots being printed and sent on July 1, 2009, that he would not be able to assume office because he had accepted a position outside the local union's jurisdiction. Consequently, the protester argues, Lopez ran for office fraudulently.

The investigation into this protest confirmed that Lopez, at the time his nominating petitions were certified, was a member of Local 221 and had the requisite two years of continuous good standing. As such he met the eligibility criteria, as set forth in the local union's by-laws, to run for and hold office. Lopez circulated a petition for the office of Secretary. His petition had the required number of signatures and he was certified, by MRG, as a candidate for that office. Lopez affiliated himself with the Unity Slate. John Rochfort, a candidate affiliated with the Reform Slate, was the only other candidate for the office of Secretary. Lopez was elected Secretary of Local 221 following the counting of ballots on July 21, 2009.

The investigation further revealed that Lopez was offered a position with the University of California at San Diego on or about July 2, 2009, not prior to July 1 as alleged in the protest. Mr. Lopez did not accept the position at UCSD until ten (10) days later, on July 12, 2009, when he was assured that despite the state budgetary crisis the position would be funded. Mr. Lopez notified the Union on July 12 that he would be accepting the new position. Mr. Lopez resigned his position in the bargaining unit on July 23, 2009, two days after winning the election for the position of Secretary. Lopez ceased being a member of Local 221 on July 31, 2009 at the end of the month through which his dues had been paid.

It is clear from the investigation that at some point during the election campaign, after July 12, 2009, Lopez knew that if he was elected Secretary,³⁰ he would be unable to assume that office since he would no longer be a member of Local 221. Election material produced by Lopez and distributed during the campaign indicated stated that Lopez wished to "continue to serve...in that capacity."³¹ In addition, the campaign

also comply with all eligibility requirements under the SEIU International Constitution and By-laws. Article XV of that document sets forth the same two (2) year continuous good standing requirement as well as stating that an individual convicted of a crime under Section 504 of the LMRDA shall not be eligible to run for or hold office in a local union. There was no evidence that the matters implicated by Section 504 were an issue in this protest.

²⁹ Article VIII, Section (3) (D).

³⁰ Lopez has held the position of Secretary in Local 221, on an interim basis, for the past two years.

³¹ See, Candidate Campaign Statement of Omar Lopez mailed as part of the official candidate information mailing to members on July 1, 2009. Attached hereto as Exhibit B.

material produced by the Unity Slate held out Lopez as its candidate for Secretary. The presumption that voters could properly draw from this material, and other campaign documents distributed during the election period, was that Lopez wished to serve and would serve, if elected. Based on the information provided in this material during the campaign, voters may have decided to support Lopez rather than Rochfort.

However, the investigation revealed that the material produced and distributed by both Lopez and the Unity Slate and distributed to the membership in the Candidate Statement mailing or at individual worksites was printed and produced prior to the actual mailing of ballots on July 1, 2009. This occurred prior to the July 2, 2009 job offer to Lopez by UCSD and his acceptance of the position on July 12, 2009. At the time Lopez circulated his petitions and at the time ballots were mailed to the membership, Lopez had not yet been offered a job outside the bargaining unit.

Campaigning for an office that an individual knows he will be unable to carry out, if elected, could well be considered misleading voters. However, it appears that such knowledge can be attributed to Lopez only after ballots were mailed in this election. In addition, there appears to be nothing in the Local 221 Bylaws, or those of the International Union, that prevents a candidate from campaigning for an office that, if elected to, he knows that he will be unable to perform. The only requirement to run for office is that the candidate be a member in continuous good standing for two (2) years prior to the date of nomination, and, presumably, maintain her/his continuous good standing until the date of the election. There is no other requirement. The investigation showed that Lopez met these requirements throughout the election period and at the time the election was certified was a member in good standing. He only ceased being qualified to hold office when he resigned from the county bargaining unit on July 23 and terminated his union membership at the end of July. Both of these events occurred after he was elected to the position of Secretary. Moreover, even if Lopez had dropped out of the race for Secretary on July 10 when he received assurances that the new position would be funded, his name would still have appeared on the ballot since these had been printed and mailed prior to July 1, 2009.

Lopez received the most votes when the tally of ballots was completed on July 21, 2008 and was certified as the winner of the election.³² However, since he resigned from the bargaining unit and his union membership lapsed by the end of July 2009, he is not eligible to be sworn into office at the September, 2009 Executive Board Meeting of Local 221. Under the provisions of the Local 221 By-laws and Constitution, when a

³² Had Lopez resigned from the bargaining unit prior to the counting of ballots it is arguable that he would have been ineligible for election because he did not meet, at the time the ballots were counted, the criteria for holding office, namely that he was a member in continuous good standing for two years *and* a member of a Local 221 bargaining unit. If this had occurred the office of Secretary would have had only one candidate contesting that office, Rochfort.

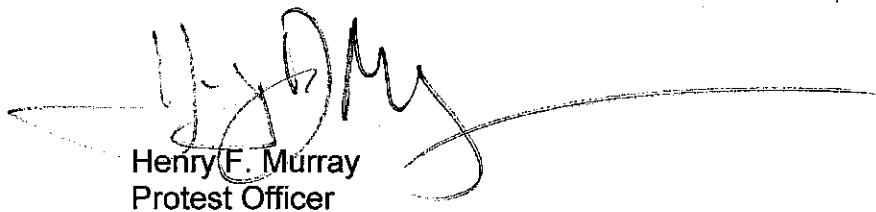
vacancy occurs in an office, other than president, the Local Union Executive Board may fill the office for the unexpired term. Although the vacancy here has occurred *after* an election but *prior* to the start of the term for that office, the language of the By-laws, empowering the Executive Board to fill such vacancies³³, seems broad enough to cover this situation. However, the filling of any vacancy for the office of Secretary is beyond the Protest Officer's authority or the allegations contained in the protest asserting that Lopez ran for office fraudulently.

As a result of the investigation the Protest Officer concludes that there is no factual basis for a challenge to the election based on the allegations contained in this charge.

III. CONCLUSION and DISPOSITION

On the basis of the investigation conducted and the findings made on each of the separate charges alleged, the undersigned Protest Officer concludes that there is no substantial basis for a challenge to the conduct of the election and the protest is, therefore, denied.

Respectfully submitted,



Henry F. Murray
Protest Officer

³³ Article VII, Section 6 (B).

cc:

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ATTACHMENT A



www.merrimanriver.com

Matthew E. Fitch, Director of Election Services
Luke M. Henrici, Director of Technology and Data

888-450-VOTE (phone)
888-224-3391 (fax)

Official Certification of Election:

In person and mail balloting was conducted for the Executive Board of SEIU Local 221. Ballots were mailed on July 1, 2009, and in person balloting was held between July 14 and July 21, 2009. Votes were counted at the Holiday Inn on the Bay, 1355 North Harbor Drive, San Diego, on Tuesday, July 21, 2009 in the presence of the Election Committee and observers. The results were:

	Schools	Counties	General	Total
President				
Sharon-Frances Moore	15	337	140	492
Monty Kroopkin	13	161	21	195
Vice President				
James Slade	14	302	133	449
Diane Sabeghi	14	179	35	228
Secretary				
Omar López	14	322	134	470
John Rochfort	13	172	27	212
Treasurer				
Alison Barkley	15	329	131	475
Robert Larsen	12	156	28	196
Politics Chair				
Michael Dobbins	12	275	109	396
Nicolaz Portillo	7	167	43	217
Member Organizing				
Merrill Mickelson	12	302	114	428
Denise Knobloch	13	172	40	225

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5757 West Century Blvd, Suite 700 • Los Angeles, CA 90045

**Social/Economic
Justice**

Margaret Johnson	14	302	120	436
Sandra Guerra	13	175	38	226

Counties - Community Services

Amy Cross		259		259
Julayne Gath		99		99
Linda Johansen		144		144

Counties - General

Alberto Parra		292		292
Cornelius Hill		182		182

Counties - HHS

Richard Lovett		247		247
Kelly Monge		129		129
Dawnetta Meshack		134		134

**Counties - Public
Safety**

Diane Cates		207		207
Renee Keester-Wellman		176		176

Schools

Douglas Collins	15			15
Rose Peralta	12			12

Nominations for Chairs in the Cities, Courts and Special Districts, Head Start and Registered Nurses Divisions were uncontested and those candidates had been deemed duly elected at the May 30, 2009 meeting of the Election Committee.

Respectfully submitted,

Matthew Fitch, Local 221 Election Consultant, July 21, 2009

