73 FLRA No. 109

UNITED STATES
DEPARTMENT OF LABOR
OFFICE OF
LABOR MANAGEMENT STANDARDS
DIVISION OF ENFORCEMENT
TRACY SHANKER, CHIEF
(Petitioner)

and

PATENT OFFICE
PROFESSIONAL ASSOCIATION
(Respondent/Union)

0-MC-0035

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DECISION AND ORDER

June 14, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

This matter is before the Authority on a petition for enforcement of a decision and order of the U.S. Department of Labor, Administrative Review Board (the Board), under 5 C.F.R. § 2428.2[1] and 29 C.F.R. § 458.92.[2] For the reasons that follow, we enforce the Board's decision and order, in part, and remand the remedial matter to the Board.

II. Background

A. The Union's 2020 Election

Every three years, the Union holds an election for its executive officers, including Union president. The last such election occurred on November 13, 2020, by mail-in ballot. Three Union members ran for president: the incumbent president and two challengers.

Before the election, the Union hired a printing company named "Gibson Print" to mail election notices to Union members.[3] Around this time, the Union also instructed election candidates to contact Gibson Print in order to have campaign literature printed and mailed to members. Specifically, the Union informed candidates: "Gibson [Print] has the membership mailing list and will be able to print and then mail [campaign] materials to either the dues-paying membership or to an area," and "[c]andidates are responsible for contacting Gibson Print[]" to arrange for campaign-material distribution.[4]

On October 2, 2020, one of the individuals challenging the incumbent for Union president (the candidate) emailed Gibson Print requesting a cost estimate for sending "5x7" and "3x5" campaign postcards to all Union members.[5] The email's subject line read, "re: [Union] election (questions about mailing postcards)."[6] In the email, the candidate also requested that Gibson Print provide an order deadline. Gibson Print neither responded to the email nor answered any of the candidate's three follow-up phone calls.

On October 16, the candidate contacted the Union about Gibson Print's failure to respond. The Union's election committee replied on October 20, assuring the candidate that Gibson Print would "reach out."[7] The election committee also provided the candidate with contact information for an "alternate printer."[8] That same day, the Union mailed the election ballots to Union

[1] Section 2428.2(a) of the Authority's Regulations provides that the Department of Labor's "Assistant Secretary [of Labor for Labor Management Relations] may petition the Authority to enforce any Assistant Secretary decision and order in a standards of conduct case arising under 5 U.S.C. [§] 7120." 5 C.F.R. § 2428.2(a); *see also* 5 U.S.C. § 7120(c). Due to a reorganization, the Department of Labor eliminated the Assistant Secretary position, and delegated that position's authority and responsibilities to the Board. *See, e.g.*, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 Fed. Reg. 69,378-01 (Nov. 16, 2012) (delegating to the Board the responsibility to review cases arising under 5 U.S.C. § 7120); Reorganization and Delegation of Authority; Technical Amendments, 78 Fed. Reg. 8022-01 (Feb. 5, 2013) (replacing "Assistant Secretary" with "Administrative Review Board" in various Department of Labor regulations).

[2] 29 C.F.R. § 458.92 (providing that the Director of the Department of Labor's Office of Labor-Management Standards can refer an Administrative Review Board's not-yet-effected remedial action to the Authority "for appropriate action").

[3] Board Decision at 3.

[4] *Id.* at 3 n.11.

[5] *Id.* at 3.

[6] *Id.*

[7] *Id.* at 4.

[8] *Id.*

members. Gibson Print never contacted the candidate, and the candidate did not mail campaign postcards.

Five-hundred-fourteen Union members voted in the November 2020 election. The incumbent president won the presidential election by 179 votes.

In December 2020, the candidate filed a complaint about the election with the Department of Labor's Office of Labor-Management Standards (the Petitioner). After an investigation, the Petitioner advanced the complaint before a Department of Labor Administrative Law Judge (the Judge), contending that the Union violated § 401(c) of the Labor-Management Reporting and Disclosure Act (LMRDA).[9]

The LMRDA sets forth union election procedures, and § 401(c) requires unions to "comply with all reasonable requests of any candidate to distribute by mail or otherwise[,] at the candidate's expense[,] campaign literature in aid of such person's candidacy to all [union] members in good standing."[10] Under Department of Labor regulations, any union subject to the Federal Service Labor-Management Relations Statute (the Statute) must conduct its elections consistent with § 401(c).[11]

Before the Judge, the Petitioner filed a Motion for Summary Decision. In a September 28, 2022 recommended decision and order, the Judge found the undisputed facts established that the Union, through Gibson Print, failed to respond to the candidate's reasonable request to distribute campaign postcards, and that failure may have affected the outcome of the Union's 2020 presidential election. Accordingly, the Judge granted the Petitioner's motion. As a remedy, the Judge directed the Union to conduct a "new election for the office of the [p]resident . . . under the [Department of Labor's] supervision" within "120 days" of the decision.[12]

In October 2022, the Union filed exceptions to the Judge's decision with the Board.

B. The Board's Decision

1. The § 401(c) Violation

To determine whether the Union violated § 401(c), the Board assessed whether the candidate's October 2020 email to Gibson Print was a request to distribute campaign material; if so, whether the request was reasonable; and, if so, whether the Union complied with that reasonable request. The Board placed the burden on the Petitioner to "prove that the [Union] violated [§] 401 by a preponderance of the evidence."[13] If the Petitioner did so, then the Board would "presume[] that the violation 'may have affected' the outcome of the election."[14]

The Union alleged that the candidate's email to Gibson Print, in which he requested a price quote for postcards, was not a request to distribute campaign material under § 401(c). The Board acknowledged that, "when viewed in isolation," the candidate's email did not overtly request that Gibson Print distribute campaign literature.[15] However, the Board declined to evaluate the email "devoid of context."[16] For example, the Board noted that the candidate contacted Gibson Print as an officially declared candidate in the 2020 Union election, and that he did so in accordance with the Union's instruction that "candidate[s]" contact Gibson Print "to have any campaign materials . . . mailed to members."[17] The Board also observed that the candidate's email identified: that it concerned the election; a specific type of campaign material; and to whom that material would be sent. Moreover, in the Board's view, the email's cost-estimate and order-deadline requests were "necessary antecedents" to the distribution of campaign material.[18] Considering these circumstances, the Board concluded that the candidate's email was a request to distribute campaign literature under § 401(c).[19]

As to the reasonableness of that request, the Board observed three relevant factors identified by the U.S. Supreme Court: (1) whether the request imposes financial hardship on the union; (2) whether the request imposes an administrative burden on the union; and (3) whether complying with the request might cause discrimination against any other candidate for office in the election.[20] The Union did not argue that the candidate's request would impose a financial or administrative burden, or that the request might cause discrimination against another candidate. Therefore, the Board found the request reasonable.

[9] Codified at 29 U.S.C. § 481(c).
[10] *Id.*
[11] 29 C.F.R. § 458.29; *see also* Board Decision at 2.
[12] Judge's Decision at 11-12.
[13] Board Decision at 9.
[14] *Id.*
[15] *Id.* at 11.
[16] *Id.*
[17] *Id.* at 10.
[18] *Id.* at 11.
[19] *Id.* (also holding that nothing in LMRDA requires a § 401(c) request be "formal" or "complete").
[20] *Id.* at 12 (citing *Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 478 (1991) (*Brown*)).

Next, the Board assessed whether the Union failed to comply with that reasonable request. Citing the LMRDA and Department of Labor regulations,[21] the Board noted that unions are required to comply with reasonable requests under § 401(c). Thus, the Board rejected the Union's "attempts to shift blame" to Gibson Print.[22] In this regard, the Board referenced the Union's "unequivocal[] represent[ation]" that it had "designated Gibson Print as an entity candidates could contact for purposes of mailing campaign literature."[23] The Board also cited multiple decisions in which courts "held unions liable . . . where the union[] designee failed to comply with a reasonable request to distribute campaign literature."[24]

Regarding noncompliance, the Union argued the candidate acted unreasonably by, among other things, failing to make arrangements with another printing company. The Board rejected the Union's arguments.[25] Because it was undisputed that Gibson Print never responded to the candidate's October 2020 email (or answered any of his follow-up phone calls), the Board concluded that the Union failed to comply with a reasonable request to distribute campaign material under § 401(c).

2. The Remedy

Having found a § 401(c) violation, the Board presumed that the violation may have affected the outcome of the Union's 2020 presidential election. When an election violation "may have affected the outcome of [the] election," the Board is permitted to "declare the election . . . void and direct the conduct of a new election under supervision of the [Department of Labor]."[26] The Board stated that, given the Union's § 401(c) violation, the Union had the "very substantial burden" to produce "tangible evidence against the reasonable possibility" that the violation affected the election.[27]

The Union alleged that, even if Gibson Print had responded to the candidate's email, he would not have ordered campaign postcards because Gibson Print would have charged at least $1,677, and the candidate budgeted only $1,500. However, the Board found the Union provided no evidence that the candidate would have been unable to modify his budget by a "meager $167," negotiate a lower price, or purchase a partial mailing consistent with his budget.[28] Thus, the Board found the Union's allegation too speculative to satisfy the burden.

The Union further argued that the candidate's ability to email Union members about his presidential candidacy negated any potential effect on the election. Although the candidate could, and did, email campaign material to Union members, the Board noted that he successfully emailed only forty-five percent of eligible Union voters—whereas his request to Gibson Print was to distribute campaign postcards to *all* Union members. In addition, the Board found that a mailed postcard, as compared to an email, may have appealed more favorably to some voters. Therefore, the Board rejected this argument.

Ultimately, the Board applied the "maximum theoretical possibility" theory, under which courts "assume that all those impacted by [a § 401(c)] violation who could have voted would have voted, and that they would have unanimously voted for the disadvantaged candidate."[29] The candidate's request was for Gibson Print to distribute postcards to all 2,844 eligible Union voters. Even after excluding the forty-five percent of Union voters who received the candidate's emailed campaign material, the Board found that 1,566 eligible voters remained. With the incumbent's margin of victory being 179 votes, the Board concluded that "postcards to some or all [of] th[ose] 1,566 eligible voters" may have affected the outcome of the election.[30]

Based on the above, the Board found it appropriate to void the Union's November 2020 presidential election, and to order a new election under the Department of Labor's supervision. Accordingly, the Board affirmed the Judge's decision, and ordered the Union to conduct the new election within 120 days of its November 16, 2022 decision—by March 16, 2023.

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[21] *E.g.*, *id.* at 14 (citing 29 U.S.C. § 481(c) ("Every national or international labor organization . . . and every local labor organization, and its officers, shall be under a duty . . . to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature . . . ." (emphasis omitted))).

[22] *Id.* at 13.

[23] *Id.*

[24] *Id.* (citing *Wirtz v. Am. Guild of Variety Artists*, 267 F. Supp. 527, 541 (S.D.N.Y. 1967); *Marshall v. Loc. No. 2, Int'l Union of Police & Prot. Emps.-Indep. Watchman's Ass'n*, No. 78 Civ. 3879-CSH, 1979 WL 1832, at *5 (S.D.N.Y. Jan. 5, 1979) (*IUP*)).

[25] *Id.* at 15 (noting that the Union specifically told candidates to contact Gibson Print and never instructed candidates what to do if "they encountered difficulties in securing the distribution of their campaign literature" through Gibson Print); *id.* at 14 ("Regardless of what might have happened with other, alternative requests, the fact remains that [the candidate's] specific October 2 request went ignored and unfulfilled.").

[26] 29 U.S.C. § 482(c); *see also* 5 U.S.C. 7120(d) (Board may take actions that it "considers appropriate to carry out the policies of this section"); 29 C.F.R. § 458.91(b) (authorizing Board to "require the respondent to take such affirmative action as it deems appropriate to effectuate the policies of the [Statute]").

[27] Board Decision at 17-18.

[28] *Id.* at 19.

[29] *Id.* at 18 (citations omitted).

[30] *Id.* at 21.

C. The Board's Denial of the Union's Motion

On January 3, 2023, the Union filed a motion with the Board to temporarily stay the supervised election until November 1, 2023, when the Union will be conducting its regularly scheduled triennial election for Union president. According to the Union, conducting the Board-ordered election in March 2023 would (1) trigger "a drop-off in [voter] participation" in the November 2023 election and (2) result in an interim Union president who would serve "only a few months" before the November election.[31]

For support, the Union cited *Donovan v. Local 10902, Communications Workers of America, AFL-CIO*.[32] In *Donovan*, the U.S. Court of Appeals for the Fifth Circuit declined to direct a new election despite finding that a § 401 violation may have affected the outcome of an earlier election. The court reasoned that the LMRDA would be satisfied so long as the Department of Labor supervised the union's upcoming triennial election.[33]

The Board found the Union failed to demonstrate that a March 2023 election would impact voter turnout in the November election. In addition, the Board distinguished *Donovan* based on "timing"[34]: the triennial election in *Donovan* was scheduled "just two to five months" after the court's decision, whereas the Union's next triennial election was "eight months" from the Board-ordered March 2023 election.[35] In the Board's view, a March 2023 election would allow the elected president to "serve[] at least eight . . . months, constituting nearly one fourth of the position's full term."[36] According to the Board, delaying the election past March 2023 would also risk the incumbent president "influenc[ing] the next election, not only for the office of [p]resident, but also for other offices and positions on the ballot."[37] For these reasons, on January 23, 2023, the Board denied the Union's motion.

D. The Petitioner's Enforcement Petition

In February 2023, the Director of the Department of Labor's Office of Labor-Management Standards (the Labor Director) issued a finding that the Union was noncompliant with the Board's decision. According to the Labor Director, the Union failed to cooperate in scheduling a pre-election conference that was necessary to conduct a supervised election by March 16, 2023.

On February 27, 2023, the Petitioner filed a petition for enforcement of the Board's decision with the Authority. The Union filed an opposition to the petition on March 9, and the Petitioner filed a supplemental submission on March 27. Although the parties voluntarily engaged in settlement discussions with the assistance of the Authority's Collaboration and Alternative Dispute Resolution Office, the parties did not reach a settlement.

III. Preliminary Matter: We consider the Petitioner's supplemental submission.

The Petitioner requests leave to file, and does file, a reply to the Union's opposition. Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Regulations states that the Authority may, in its discretion, grant leave to file "other documents" as it deems appropriate.[38] As relevant here, the Authority has granted such leave where the supplemental submission responds to matters raised for the first time in an opposing party's filing.[39]

With its reply, the Petitioner seeks to respond to "new" exhibits that the Union submits with its opposition.[40] These exhibits consist of email exchanges between the parties related to the Board-ordered March 2023 election,[41] and the Union acknowledges that some of its exhibits supplement the evidence that the Petitioner provides.[42] As it is undisputed that the Union's opposition introduces new evidence, we find it appropriate to consider the Petitioner's reply.

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[31] Mot. to Stay at 2-3.
[32] *Id.* at 2 (citing 650 F.2d 799 (5th Cir. Unit B July 1981) (per curiam)).
[33] *Donovan*, 650 F.2d at 802.
[34] Board Denial of Mot. at 5 n.17.
[35] *Id.*
[36] *Id.* at 5.
[37] *Id.*
[38] *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010) (*Treasury*); 5 C.F.R. § 2429.26(a).
[39] *Treasury*, 64 FLRA at 589.
[40] Reply at 1.
[41] *See, e.g.*, Opp'n, Exhibits B & C. We note that the email evidence occurred in 2023, so the Union could not have presented it to the Board during the 2022 proceedings.
[42] *E.g.*, Opp'n at 3-4 (claiming that the enforcement-petition evidence is incomplete, and submitting exhibits that "complete" the record).

IV. Analysis and Conclusions

A. The Union failed to comply with the Board's decision.

In opposition to the enforcement petition, the Union makes several arguments challenging the Labor Director's finding that the Union failed to comply with the Board's decision.[43] We are limited in our consideration of these arguments. Department of Labor regulations grant the Labor Director the authority to "find[] that [a Board-ordered] remedial action has not been effected,"[44] and neither the Authority's Regulations nor the Department's provide an avenue for challenging such a finding.

In any event, the evidence does not show that the Union attempted to comply. The Union only offered to have the Department of Labor supervise the Union's regularly scheduled November election, and it continued to make that offer even after the Board affirmed the appropriateness of a March 2023 election.[45] Offering *not* to conduct the Board-ordered election is not an attempt to comply with the Board's decision. In short, there is no basis to question the Labor Director's finding.

B. The Board's conclusion that the Union violated § 401(c) is not arbitrary and capricious, or in manifest disregard of the law.

Section 2428.3 of the Authority's Regulations provides that a Board decision "shall be enforced unless it is arbitrary and capricious or based upon manifest disregard of the law."[46] In assessing whether a Board decision is "arbitrary and capricious," we find it appropriate to apply the standard that courts use under the Administrative Procedure Act (the APA).[47] Arbitrary and capricious review under the APA is "highly deferential," and the agency's action is presumed valid.[48] Under this standard, the Authority cannot substitute its judgment for the Board's,[49] and "must affirm" the Board's decision if a rational basis for it exists.[50]

Repeating the arguments it made to the Board, the Union challenges the Board's conclusion that the Union, through Gibson Print, failed to comply with a reasonable request to distribute campaign literature under § 401(c). As stated above, § 401(c) requires unions to "comply with all reasonable requests of any candidate to distribute by mail or otherwise[,] at the candidate's expense[,] campaign literature in aid of such person's candidacy to all [union] members."[51]

1. The Board's finding that the candidate's email was a request to distribute campaign literature.

The Union argues that the candidate's October 2020 email to Gibson Print was not a request to distribute campaign material, and that the Board's contrary conclusion conflicts with *Huff v. International Union of Security Officers*.[52] However, *Huff* is an unpublished—and, as the Union concedes, "nonprecedential"—decision.[53] The Union does not explain how such a decision could be the basis for finding the Board's decision arbitrary and capricious, or in manifest disregard of the law.[54] Regardless, *Huff* is distinguishable.

In *Huff*, a candidate for union office asked the union for "the name of the mailing service that would be

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[43] *Id.* at 1 (alleging that it "is simply not true" that the Union "failed to cooperate with [the Petitioner] in scheduling a meeting to begin the process of holding the supervised election" and disputing the Labor Director's opposite conclusion), 4 (claiming that the Petitioner "terminated communication" and failed to respond to Union emails regarding a proposed timeline for a supervised election).

[44] 29 C.F.R. § 458.92.

[45] *See* Opp'n, Union Ex. A (telling Petitioner that Union is "disinclined to incur the expense" of conducting an election in March 2023 but "would welcome the Department[of Labor's] assistance in supervising its next regularly scheduled election"); Opp'n at 2-4 (Union acknowledging that it "repeated[ly]" proposed to the Petitioner, including in a January 30, 2023 letter, that the supervised election "be conducted . . . [at] the Union's next regularly scheduled election" in November 2023).

[46] 5 C.F.R. § 2428.3(a).

[47] *See* 5 U.S.C. § 706(2).

[48] *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009) (*Napolitano*) (discussing standard of review under APA); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (*EPA*) (same); *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1320 (11th Cir. 2021) (same).

[49] *See Napolitano*, 558 F.3d at 114; *EPA*, 541 F.2d at 34; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

[50] *See Napolitano*, 558 F.3d at 114; *see also EPA*, 541 F.2d at 34 ("requires affirmance if a rational basis exists"); *Dep't of VA Med. Ctr. v. FLRA*, 16 F.3d 1526, 1529 (9th Cir. 1994) (court "must affirm" Federal Labor Relations Authority decision that is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (citation omitted)).

[51] 29 U.S.C. § 481(c).

[52] Opp'n at 19 (citing 165 F.3d 915 (9th Cir. 1998) (unpublished)).

[53] *Id.*

[54] *See Chan v. Reno*, 113 F.3d 1068, 1073 (9th Cir. 1997) ("[U]npublished precedent is a dubious basis for demonstrating the type of inconsistency which would warrant rejection of deference." (quoting *De Osorio v. U.S. INS*, 10 F.3d 1034, 1042 (4th Cir. 1993))).

handling the campaign mailings."[55] The court found "nothing" in that communication "indicated that [the individual] was seeking assistance in conducting [a] campaign mailing."[56] In contrast, the Board found the candidate here: contacted the Union's designated campaign-mailing company;[57] did so in accordance with the Union's instruction;[58] alerted the company that his communication concerned the Union election;[59] identified a specific type of campaign material for distribution;[60] requested a price quote to send that material to all Union members;[61] and requested an order deadline.[62] Taken together, the Board found this uncontested evidence "clearly 'indicate[d] that [t]he [candidate] *was* seeking assistance in conducting his campaign mailing'"—unlike the individual in *Huff*.[63] Although the Union disagrees with that reasoning, the Board provided a detailed and rational explanation, and we see no basis for finding that explanation arbitrary and capricious, or in manifest disregard of the law.

The Union next contends that "the candidate must [have] express[ed] a firm willingness to pay" for campaign-literature distribution in order for his email to constitute a request under § 401(c).[64] For support, the Union cites *Marshall v. Local Union 478, Laborers' International Union of North America, AFL-CIO*.[65] There, the U.S. District Court for the Southern District of Florida found an individual's "express offer of payment was all that was required" to trigger the union's compliance with § 401(c).[66] Unlike the Union, we do not interpret the court as imposing a universal offer-to-pay requirement on all § 401(c) requests. The court was merely communicating what was *sufficient* "under the[] circumstances" of that case to trigger that union's obligation.[67] Thus, the Union's reliance on *Marshall* does not demonstrate that the Board's decision is in manifest disregard of the law.

Without support, the Union also suggests that postcards are not "campaign literature" under § 401(c).[68] However, the U.S. District Court for the District of Columbia has found, in the context of § 401(c), that "campaign 'literature' means 'printed matter of *any* kind.'"[69] Accordingly, the Union's suggestion is unavailing.

Similarly unavailing is the Union's argument that it "can[not] be faulted" for Gibson Print's failure to respond to the candidate's email.[70] It is undisputed that the Union told election candidates that they could contact—and, in fact, were "responsible for contacting"—Gibson Print to arrange for campaign-literature distribution.[71] The Board concluded that the Union could not escape its obligations under § 401(c) by designating a printing company to fulfill § 401(c) requests.[72] The Board based that conclusion on court decisions finding violations of § 401(c) due to union "designee[s] fail[ing] to comply with a reasonable request to distribute campaign literature."[73] The Union does not present any competing authority.

Based on the above, the Union provides no basis for setting aside the Board's conclusions that the candidate's email was a § 401(c) request and that the Union was responsible for Gibson Print's inaction.[74]

2. The Board's findings that the candidate's request was reasonable and that the Union failed to comply with that request.

The U.S. Supreme Court has stated that the "language of [§ 401(c)] plainly requires unions to comply with 'all reasonable requests'" and that requirement is

[55] *Huff*, 165 F.3d at 915.
[56] *Id.*
[57] Board Decision at 10.
[58] *Id.* at 11.
[59] *Id.* ("His email indicated in the subject line that he was contacting the printer concerning the [e]lection . . . .").
[60] *Id.* ("postcards in one of two sizes").
[61] *Id.*
[62] *Id.*
[63] *Id.* at 11 n.61 (emphasis added) (distinguishing *Huff*).
[64] Opp'n at 20.
[65] 461 F. Supp. 185 (S.D. Fla. 1978).
[66] *Id.* at 192.
[67] *Id.* (finding that, "[u]nder the[] circumstances" of the case, an "express offer of payment was all that was required," so it was irrelevant that the individual did not "tender a cash payment for the services he sought" or "apprise the union of the extent of the literature which he wanted the union to distribute").
[68] Opp'n at 19.
[69] *Noble v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 2022 WL 17613057, *5 (D.D.C. 2022) (emphasis added) (quoting Webster's New Twentieth Century Dictionary of the English Language 2d ed. (1958)), *appeal filed* (Feb. 1, 2023).
[70] Opp'n at 21.
[71] Board Decision at 3 n.11.
[72] *Id.* at 13.
[73] *Id.* (citing *Wirtz*, 267 F. Supp. at 541 (stating "duty to comply with a candidate's request to distribute campaign literature . . . is a duty imposed upon [the union], not the independent agen[t]"); *IUP*, 1979 WL 1832, at *5 ("[W]hile a union can appoint an agent to handle [campaign] mailings, and perhaps even indicate all requests therefor be directed to that agent, the statutory responsibilities for a 'failure to comply with reasonable requests' remain with the union.")).
[74] *See Ctr. for Biological Diversity v. Esper*, 958 F.3d 895, 910 (9th Cir. 2020) ("Where the agency has relied on relevant evidence . . . that a reasonable mind might accept as adequate to support a conclusion, its decision is supported by substantial evidence, and th[e] court must affirm the agency's finding.").

absolute.[75] It is undisputed that Gibson Print did not respond to the candidate's email. As discussed above, the Union has not shown that the Board erred in finding the candidate's email was a § 401(c) request and that the Union is responsible for Gibson Print's failure to respond. The only remaining issue is whether the request was reasonable—the Board found that it was,[76] and the Union does not challenge that finding. While the Union raises other arguments about the request,[77] they are immaterial to whether the request was reasonable.[78]

Further, that the candidate emailed, or otherwise had the opportunity to distribute, campaign material does not demonstrate that the Union complied with § 401(c).[79] Both the Board and Judge found that the candidate accomplished a partial email campaign through his own efforts, without Union assistance.[80] To the extent the Union now argues that (1) the candidate sent a separate campaign-distribution request only to the Union, (2) in response to that request, the Union assisted with the candidate's email campaign, and (3) that assistance "cured" Gibson Print's failure to respond,[81] those arguments are inconsistent with the Union's arguments to the Board.[82] As such, we do not consider them.[83]

Finally, although the Union provided the candidate with the name of an "alternate printer" in late October 2020,[84] the Union assured the candidate, in the same correspondence, that Gibson Print would "reach out."[85] The Board found that Gibson Print never did so.

To conclude, the Union has not demonstrated that the Board's assessment of the Union's § 401(c) arguments was arbitrary and capricious, or in manifest disregard of the law.

C. The Board's conclusion that the Union's § 401(c) violation may have affected the outcome of the November 2020 presidential election is not arbitrary and capricious, or in manifest disregard of the law.

If a § 401(c) violation "may have affected the outcome" of an election, then the Board may, but is not required to, set aside the election.[86] Once a § 401(c) violation has been established, the presumption is the violation may have affected the election's outcome.[87] It is the Union's burden to show that the violation "did not affect the outcome."[88] In order to meet that burden, the Union must provide "tangible evidence against the reasonable possibility" that the violation affected the election's outcome.[89]

Here, the Board relied on the "maximum theoretical possibility" theory to conclude that the Union's violation may have affected the outcome of

[75] *Brown*, 498 U.S. at 475-76 (the "§ 401(c) right is unqualified"); *see also* Board Decision at 14 (calling the Union's compliance "mandatory").
[76] Board Decision at 13.
[77] *E.g.*, Opp'n at 23-24 (arguing *not* that the candidate's request was unreasonable, but that his subsequent actions—waiting two weeks before contacting the Union—were unreasonable); *id.* at 21-22 (speculating that the candidate would not have ordered the postcards had Gibson Print responded because he would have been unable to increase his budgeted $1,500 by another $167).
[78] *See Brown*, 498 U.S. at 478 (noting that the "straightforward" question posed by § 401(c) is whether *the request* is reasonable, and a union can contest a request's reasonableness by alleging that the "request caused administrative or financial hardship to the [u]nion or that it discriminated against any other candidate"); Board Decision at 12-13 (noting Union did not argue that request "would have created financial or administrative hardship on the [U]nion or caused discrimination against any other candidate").
[79] Opp'n at 25 (alleging that Gibson Print's failure to respond did not prevent the candidate from otherwise sending campaign literature to Union members).
[80] Board Decision at 5 (stating that the candidate "utilized an external employer locator website to find [Union] employees' names, and then attempted to generate [Union] email addresses for the employees using what he understood to be [the Union's] standard email address convention"); Judge's Decision at 10 (finding that, on October 21, 2020, the candidate "requested that [the Union] send out an email to all members with . . . candidate[] bios," but the Union "never responded to [that] request").
[81] Opp'n at 25, 31 (claiming candidate "was able to distribute his campaign literature despite the failure of Gibson [Print] to provide a price quote, and *he did so with the Union's assistance*").
[82] Exceptions at 9 (arguing the candidate did *not* request assistance with his email campaign in an October 21, 2020 email to the Union); Board Decision at 6 n.33 (finding that, in response to the Union's exceptions, Petitioner "decided to forego any claim that [the candidate's] October 21, 2020 email constituted an independent request to distribute [emailed] campaign literature" separate from the candidate's October 2 email to Gibson Print).
[83] *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *id.* at 742 ("where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position" in a later phase of the case); *cf. AFGE, Loc. 2145*, 69 FLRA 7, 8 (2015) ("[T]he Authority will not consider arguments offered in support of an exception if those arguments differ from, or are inconsistent with, a party's arguments to [an] arbitrator.").
[84] Board Decision at 4.
[85] *Id.*
[86] *Id.* at 9, 22.
[87] *Wirtz v. Hotel, Motel and Club Emp. Union, Loc. 6*, 391 U.S. 492, 506-07 (1968) (*Loc. 6*); *see also* Board Decision at 9.
[88] *Loc. 6*, 391 U.S. at 507; *see also* Board Decision at 9-10.
[89] *Loc. 6*, 391 U.S. at 508; *see also* Board Decision at 9.

the Union's November 2020 presidential election.[90] With the margin of the incumbent's victory being only 179 votes, the Board determined that campaign "postcards to some or all [of] the 1,566 eligible voters [that the candidate] did not reach via email may have changed the outcome."[91] The Union does not contest the Board's use of the "maximum theoretical possibility"[92] theory as a means to measure the possible effect of the § 401(c) violation. Nor does the Union challenge the numerical evidence the Board relied upon in applying that theory.

The Union contends only that (1) even if Gibson Print responded, the candidate would not have ordered the postcards because Gibson Print would have charged at least $167 more than the candidate was willing to pay,[93] and (2) even if the candidate had ordered campaign postcards, they would have been less effective than his partial email campaign.[94]

The Board found those contentions meritless,[95] and there is no basis for concluding that the Board's finding is arbitrary and capricious, or in manifest disregard of the law. The Union's burden is to provide "tangible evidence" that its violation *did not* affect the election.[96] Speculation about what might have occurred is insufficient to meet that burden.[97] As the Board stated, it is possible that the candidate could have adjusted his budget or negotiated a lower price with Gibson Print.[98] It also is "possible" that a mailed postcard would have appealed more favorably to some voters than an email.[99] Accordingly, the Union's contentions provide no basis for finding the Board erred in concluding that the Union's violation *may* have affected the election's outcome.

D. A remand is appropriate to allow the Board to remedy the Union's § 401(c) violation.

March 16, 2023 has passed, so we are unable to enforce the Board's remedy directing a new election by that date.[100] The Petitioner does not request that the Authority direct a new election within 120 days of this decision, and the Board's current decision does not support such a modified remedy. When the Board denied the Union's motion to stay the March 2023 election until the Union's November 2023 triennial election, the Board reasoned that a March election would permit the elected president to "serve[] at least eight . . . months, constituting nearly one fourth of the position's full term."[101] On that basis, the Board also distinguished *Donovan*[102]—a decision in which the Fifth Circuit found it unnecessary to require a new election approximatively two months before a regularly scheduled triennial election.[103]

Due to the Union's approaching triennial election, directing a supervised election within 120 days of this decision could result in the elected president serving just one month. Thus, the Board's "timing"-specific rationale for distinguishing *Donovan*, and requiring the Union to conduct a supervised election before November, is no longer valid.[104] However, simply setting aside the Board's directed remedy would leave the Union's § 401(c) violation effectively unresolved. That result would also fail to address the Board's concern that the incumbent president may, "through the imprimatur of the office to which the incumbent may not be entitled, . . . influence the next election, not only for the office of [p]resident, but also for other offices and positions on the ballot."[105]

Under the Authority's Regulations, the Authority must "enforc[e], enforc[e] as modified, refus[e] to enforce, or remand[] the decision and order of the [Board]."[106] Consistent with that authority, and after considering the present circumstances, we find a remand appropriate. A remand will allow the Board to remedy the Union's § 401(c) violation in light of the temporal constraints caused by the Union's failure to comply with the Board's original remedy.

V. Order

We enforce the Board's decision, in part, and remand the remedial matter to the Board.

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[90] Board Decision at 18.
[91] *Id.* at 21.
[92] *Id.* at 18.
[93] Opp'n at 30-31 (claiming Gibson Print would have charged $1,677.51 for the 3x5 postcards).
[94] *Id.* at 32-33.
[95] Board Decision at 21.
[96] *Loc. 6*, 391 U.S. at 507.
[97] *Cf. id.* (finding union could demonstrate that violation did not affect election where violation affected only "20 percent of the votes in an election" but "all officers had won by an 8-1 margin" (citation omitted)); *see also Chao v. Amalgamated Transit Union, AFL-CIO, CLC*, 141 F. Supp. 2d 13, 24 (D.D.C. 2001) (rejecting union arguments based on "pure conjecture" and "involv[ing] nothing but guesswork" about "what would have happened at an untainted" election).
[98] Board Decision at 19.
[99] *Id.* at 21.
[100] Board Denial of Mot. at 3 (ordering "supervised election to be conducted by March 16, 2023").
[101] *Id.* at 5.
[102] *Id.* at 5 n.17.
[103] 650 F.2d at 802 (finding "LMRDA will be satisfied by the [union's] regular triennial nomination and election of officers under the supervision of the" Department of Labor).
[104] Board Denial of Mot. at 5 n.17.
[105] *Id.* at 5.
[106] 5 C.F.R. § 2428.3(b).