

FINAL REPORT OF THE NYSNA ELECTION COMMITTEE  
WITH RESPECT TO THE 2011 ELECTION  
October 14, 2011

Background and Authority

The Election Committee of the New York State Nurses Association (the “Election Committee”) was established under the authority of the NYSNA Board of Director’s Policy 3-8—Election Protest Procedure (adopted June 11, 2008 and revised August 27, 2008) (the “Procedure”). The Procedure provides that “all protests from members concerning all aspects of the election process shall be heard and determined by the Election Committee.” (Procedure at page 1.)

The Procedure provides that any protest of “any alleged improper election or post-election conduct or event must be filed within fifteen (15) days of the date of the announcement of the election results.” (Procedure, Section 2(a) at page 3.) Since the results of the election tallies were announced on August 25, 2011, the last day to file protests was September 8, 2011. The Election Committee considered 14 pre-election protests that were held over to the post-election period and 31 post-election protests that were timely received.

The Procedure further provides that “post-election protests shall be considered and remedied if it is determined that the alleged violation may have affected the outcome of the election. (Procedure, Section 2(b) at page 3.)

The Procedure also provides for the following with respect to remedies:

3. Remedies

If as a result of any timely protest filed, or any investigation undertaken by the Election Committee without regard to whether a timely protest has been filed, the Election Committee or Appeals Committee determines that any NYSNA election rules have been violated or that any other conduct has occurred which may prevent or has prevented a fair, honest, and open election, the Election Committee or Appeals Committee, as applicable, may take whatever remedial action is appropriate.

These remedies are in addition to, and not in lieu of, the remedies that may be appropriately imposed following charges brought under the NYSNA Disciplinary Procedure.

4. Rerun Elections

Should the Election Committee or the Appeals Committee, in an appeal to the Election Committee’s decision, refuse to certify any

election, the Election Committee or Appeal Committee, as applicable, shall immediately order that a rerun election be held, including, if necessary, the rerunning of the nomination process. Upon receipt of the decision from the Election Committee or the Appeals Committee, the CEO will implement the rerun election as soon as feasibly possible. Rerun nominations and/or elections shall be conducted and administered by the Election Committee. (Procedure, Sections 3 and 4 at pages 4-5.)

All five of us comprising the Election Committee are employed full time in the profession; we work and reside in various regions of New York State, and are not NYSNA staff. We met 4 times for approximately 20 hours to consider more than 40 separately cognizable protests filed by more than 130 members. We have now completed our review and investigation of the protests and as the Election Committee make the following determinations and take the following remedial action.

#### Interim Report of September 16, 2011

The Election Committee had previously determined that it would not, because it could not under applicable law certify the election of the office of president-elect for the reasons stated in the Election Committee's Interim Report of September 16, 2011, a copy of which is enclosed with this Final Report and incorporated herein. Briefly, that office currently provides for a four-year term, which is in violation of the requirement that local union officers be elected "not less than once every three years . . ." Section 401(b) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 481(b). The Election Committee understands that NYSNA's standing Committee on Bylaws has submitted proposed amendments to NYSNA's Bylaws to the Board of Directors for consideration and submission to a special membership meeting for adoption. While the Election Committee does not know the details of these proposed amendments to the Bylaws, we understand that they are meant to correct the current illegality of the term of office for president-elect. Therefore, if and when those amendments are adopted, we fully anticipate that there will be an election held to fill that newly adopted office. Nevertheless, the determinations and remedy adopted below for the other offices of the Board of Directors would apply to that of president-elect if it did not have an unlawful term.

#### Review and Determinations on Protests

The Election Committee has determined that there were serious violations of Section 401(g) of the LMRDA, 29 U.S.C. § 481(g), and NYSNA Board of Directors Policy 1-26 (adopted January 9, 2008) that prevented a fair, honest, and open election and that may have affected the outcome of the election. The former provides that:

No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of any employer shall be contributed or applied to promote the candidacy of any person in

an election subject to the provisions of this title. Such moneys or a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election. (Section 401(g) of the LMRDA)

The latter NYSNA Board of Directors' Policy provides in relevant part that:

No member or group of members shall receive, accept, use or expend any contributions, funds, goods, services or other thing of value from or on behalf of any outside labor organization for the purpose of supporting or opposing (1) any candidate for NYSNA office or for a position within NYSNA, . . . ; provided however, that nothing in this provision shall infringe upon the rights of any member to freedom of speech or assembly under federal or state law.

Violation of this policy may be subject to action under the provisions of board policy 1-7 Guidelines, Policies and Procedures re: Disciplinary Action. (Policy 1-26, Limits on Member Use of Money from Outside Labor Organizations.)

There were protests filed alleging that one slate of candidates—NY Nurses for Staffing, Security & Strength (“SSS slate”)—utilized the services of Steven Toff, a Labor Representative of National Nurses United (“NNU”), a national union representing registered nurses that is affiliated with the AFL-CIO. Toff was formerly a New York Regional Organizing Coordinator of United American Nurses (“UAN”), a national nurses’ union affiliated with the AFL-CIO and with which NYSNA was previously affiliated. The UAN and other nurses unions, including the California Nurses Association (CNA), created the NNU in 2009 and the NNU is the UAN’s direct successor as an AFL-CIO affiliate.

It is undisputed that Toff campaigned for the SSS slate during June, July, and August 2011. The Election Committee reviewed numerous written statements and photographs submitted by NYSNA members and staff attesting to and showing Toff’s campaign activities at numerous hospitals and medical centers during that time period.

The Election Committee also reviewed metadata from a SSS slate e-mail blast that was part of NYSNA’s e-mail blasts sent to members on behalf of all candidates showing that the SSS slate’s campaign PDF was authored by Toff on June 16, 2011.

And the Election Committee reviewed the second amended complaint of one of the SSS slate candidates, Patricia Kane, in Kane, et al. v. NYSNA, et al., Case No. 11-cv-6505 (RJS) (second amended complaint filed Oct. 7, 2011), in which plaintiffs state in paragraph 62 that Toff “left the employ of NNU on May 31, 2011 in order to go to law school. At no time while employed with NNU did he do any work with Kane or her slate.” In statements received and reviewed by the Election Committee, Toff was

reported as telling NYSNA members and staff employees with which he interacted during his campaigning for the SSS slate that he had resigned his employment with NNU and was going to be enrolling in the Northeastern University School of Law in late August or early September 2011.

The Election Committee reviewed publicly available union LM-2 financial reports filed with the United States Department of Labor (“DOL”) where Toff is listed as an employee of labor organizations and his total compensation is shown. The LM-2 report filed by UAN for the period from 1/1/2009 through 12/31/2009 (DOL File Number 542-208) shows Toff with the title of regional organizing coordinator, but with no other status shown, with salary for that year totaling \$65,549.

The LM-2 report filed by the NNU (as described above, the successor of the UAN) for the six-month period from 1/1/2010 through 6/30/2010 (DOL File Number 544-309) shows Toff with the title of national organizer, with the status for the CNA/National Nurses Organizing Committee, with his total compensation for that period of \$46,998. The LM-2 report filed by the NNU for the annual period from 7/1/2010 through 6/30/2011 (DOL File Number 544-309) shows Toff with the title of labor representative but no other status and with his total compensation for that period of \$121,255. Toff is not listed as an employee on the LM-2 reports of the CNA or other labor organizations for those time periods of January 2009 through June 2011.

The Election Committee was concerned that, even if Toff had formally resigned his employment with the NNU effective May 31, 2011, there was the possibility that he was receiving financial support from that labor organization when he was involved in campaign activities on behalf of the SSS slate during June, July, and August 2011. The Election Committee’s concern was based in part upon the dramatic increase in Toff’s total compensation for the reported eleven months of employment with the NNU from July 1, 2010 through May 31, 2011 as compared to the annualized total compensation from the NNU for the six months before that time period and his annual total compensation from the UAN for 2009.

The Election Committee afforded Toff the opportunity to be interviewed either in person or by telephone during its October 14, 2011 meeting but heard nothing from Toff. The Election Committee determined that Toff was indeed enrolled as a student at the Northeastern University School of Law by reviewing downloaded pages from that law school’s website showing Toff running to be a first year (1L) representative on the law school’s Curriculum Committee and Governing Council (<http://mylaw.slaw.neu.edu/node/19213> and <http://mylaw.slaw.neu.edu/node/19043>, retrieved October 5, 2011). The Election Committee wrote to Toff that same day, advising him of election protests alleging his campaigning on behalf of various candidates and their slate and our wanting to investigate the possible support for his activities by another labor organization. The letter requested Toff to respond to a NYSNA staff member, giving her phone number and e-mail address at NYSNA, as to whether he would be available in person or by telephone to be interviewed by the Election Committee on October 14, 2011. The letter was confirmed delivered to the law

school the morning of October 6, 2011. Neither the NYSNA staff member nor anyone else employed by or representing NYSNA reported receiving any response from Toff to the Election Committee's letter.

The Election Committee has determined that the letter to Toff was received and that he chose, which was his right, not to respond to the request to be interviewed by us. Consequently, the reasonable inference drawn by the Election Committee is that Toff was being compensated by the NNU during all or parts of his June through August 2011 campaign activities on behalf of the SSS slate (e.g., remaining an employee of the NNU, or on that labor organization's payroll during that time period, or receiving extraordinary severance payments or unemployment insurance payments to which he would not have been entitled because of his voluntary resignation from employment to attend law school).

The Election Committee has determined that this violation of the LMRDA and NYSNA's own policy prevented a fair, honest, and open election and may have affected the outcome of the election. This determination is based upon the SSS slate having the services of an experienced organizer to work full time on behalf of those candidates and their slate with those services being paid by an outside labor organization.

The Election Committee's inference here is also buttressed by other evidence of the NNU providing financial support for the SSS slate. The law firm of Cohen, Weiss and Simon LLP and partner Susan Davis were shown by metadata provided to the Election Committee to have created and drafted two letters that SSS slate member Patricia Kane sent in July 2011 to NYSNA that were forwarded to the Election Committee. The Election Committee was also told that Susan Davis had called both the outside vendor handling the election balloting, SBS in Minnesota, and a NYSNA staff member asking questions about various aspects of the balloting process.

The Election Committee then sought clarification from candidate Kane and the members of her slate concerning the basis for payments for what appeared to be their legal representation by Cohen, Weiss and Simon and Susan Davis. Such legal representation was and is certainly a right that candidate Kane, the members of the SSS slate, and any other candidates have. The questions that the Election Committee had concerned whether the NNU, another labor organization, or an employer was paying for the legal representation in violation of Section 401(g) of the LMRDA.

In response to the Election Committee's July 29, 2011 letter requesting such information (e.g., copies of any retainer agreements, records of payments, and the like), the members of the SSS slate, except for candidate Kane, denied having any knowledge of legal representation by Cohen, Weiss and Simon and Susan Davis. Candidate Kane responded to the Election Committee's request by e-mail on August 5, 2011. Candidate Kane stated that she consulted with Susan Davis, who had been the general counsel of the UAN and counsel to the NNU, with respect to LMRDA compliance purposes only. Candidate Kane stated that Cohen, Weiss and Simon and Susan Davis had not been retained as her or the SSS slate's attorneys. Candidate

Kane has also stated the same in paragraphs 52 through 62 of the Second Amended Complaint in Kane, et al. v. NYSNA, et al., where Cohen, Weiss and Simon and Susan Davis are representing Kane and the other plaintiffs.

Furthermore, candidate Kane forwarded to NYSNA and the Election Committee a copy of an August 2, 2011 letter to her from Susan Davis of Cohen, Weiss and Simon. The entire text of the letter reads as follows:

I write in connection with the July 29, 2011 letter from Robert Warner, chair of the NYSNA Election Committee, which you forwarded to me.

This to confirm that neither you nor any member of NYSNA has asked me or anyone in my firm to provide any legal services or advice, or undertake any activity, for the purpose of supporting or opposing any candidate for NYSNA office. The only legal services we rendered involved providing advice in connection with election law compliance issues arising under Title IV of the LMRDA. Consistent with that, I drafted two letters to NYSNA regarding a variety of Title IV issues. Prior to providing these services, I conferred with the Office of Labor Management Standards of the Department of Labor and confirmed that this type of legal compliance assistance did not constitute an impermissible campaign contribution under Section 401(g) of the LMRDA.

The Election Committee found Kane's August 5, 2011 statements about the claimed non-representation of her and the SSS slate by Cohen, Weiss and Simon and Susan Davis, and particularly the August 2, 2011 letter by Susan Davis, to be so peculiar as to lead to the reasonable inference that Cohen, Weiss and Simon and Susan Davis were representing the SSS slate and were plausibly being compensated by the NNU for such services.

The Election Committee also found violations of Section 8(g) of the LMRDA with respect to improper employer support for candidates. Since some of the candidates so supported failed to gain a majority or plurality of votes entitling them to be considered as having prevailed for the office or position sought, those violations did not affect the outcome of the election. Nevertheless, some of the candidates for positions on the Nominating Committee, which is provided under Article XIII of NYSNA's Bylaws, benefited from such support.

There was a protest filed with respect to a YouTube video produced and broadcast by candidate Eileen Dunn. The video showed candidate Dunn delivering a campaign message while sitting in an office or library where the bookshelves on the wall appeared to be lined with law books. The Election Committee investigated this protest by writing to and then interviewing candidate Dunn about the location of the video. Specifically, we asked candidate Dunn if the video was recorded in the offices of an

attorney and, if so, whether the attorney had been retained by candidate Dunn to represent her in the election. If so, the Election Committee requested copies of any retainer agreement, fee payments, and the like.

Candidate Dunn told the Election Committee that the attorney was not representing her in the election and that she and the attorney were involved in an organization attempting to acquire financing and approval for the establishment of a hospital in lower Manhattan in New York City to provide for medical services lost when St. Vincent's Hospital was closed. Candidate Dunn told the Election Committee that this attorney provided her office library to Dunn free of charge for the recording of the video. The Election Committee has determined that the provision of free space in which to record a campaign video was a violation of Section 401(g) of the LMRDA. Inasmuch as candidate Dunn's vote total placed her well short of a majority or plurality for the office she was seeking, the Election Committee has determined that this violation did not affect the outcome of the election.

There was another protest concerning a list serve maintained by various nursing school programs and their deans and directors that was used by candidates opposed to the SSS slate of candidates. The Election Committee reviewed copies of documents establishing that this list serve, along with employees of a college-based nursing program, were utilized to communicate to members of the list serve, including members of NYSNA, on behalf and in support of candidates opposed to the SSS slate. The Election Committee has determined that this campaign support on behalf of those candidates opposed to the SSS slate was a clear use of employer resources to support a group of candidates. Consequently, such conduct was a violation of Section 401(g) of the LMRDA. Furthermore, the Election Committee has determined that this violation may have affected the outcome of the election with respect to the election to positions on the Nominating Committee.

The Election Committee received no protests with respect to the balloting for delegates representing NYSNA at the American Nurses Association House of Delegates. And the Election Committee discerned no other violations with respect to that balloting. Therefore, the results of the election for delegates representing NYSNA at the American Nurses Association House of Delegates are certified.

The Election Committee has reviewed and decided all other protests filed and has written, or will be writing, to those members informing them that the Election Committee has found their respective protests or elements of their protests without merit and advising those members that they may take an appeal of the Election Committee's determination to the election Appeals Committee as provided in the Procedure cited and quoted earlier in this Final Report.

## Remedy

The Election Committee has determined that the serious violations described above may have affected the outcome of the election. Consequently, and as authorized in the Procedure, the Election Committee is ordering NYSNA's CEO to conduct a rerun election for the positions of treasurer, directors at large, and Nominating Committee. The Election Committee has determined that there is no need to rerun the nominating process since there were no protests filed with respect to the nominating process and the Election Committee otherwise found no violations with respect to the nominating process. The candidates for those offices and positions, should they continue to seek the offices or positions, shall be the same as those who participated in the initial election balloting.

The Procedure specifies that rerun elections "shall be conducted and administered by the Election Committee." The Election Committee therefore directs that the rerun election be conducted by a reputable balloting company through its offices in New York State. The Election Committee believes that the election services department of the New York City office of the American Arbitration Association would likely be able to provide the services of conducting the rerun election. To that end, the Election Committee directs that the rerun election be by mail ballot only. The balloting results from August 25, 2011 show that less than a quarter of the ballots were cast via the Internet. Given that all members are mailed ballots, the Election Committee believes that the cost savings and the elimination of possible ballot security issues with electronic Internet voting warrant the use of only a mail ballot.

Respectfully submitted,

Robert Warner, MS, RN, Chairperson  
Lukmon Kalejaiye, MS, RN-BC, CNS  
Monica King, MPH, RN  
Ellen LaDieu, MS, RN  
Patricia Matthews, MSN, RN

Enclosure (Interim Report of Sept. 16, 2011)

INTERIM REPORT OF THE NYSNA ELECTION COMMITTEE  
WITH RESPECT TO THE 2011 ELECTION  
September 16, 2011

The Election Committee of the New York State Nurses Association (“Election Committee”) was established under the authority of the NYSNA Board of Director’s (“Board”) Policy 3-8 (Adopted June 11, 2008 & Revised August 27, 2008). The Board has directed that “[a]ll protests from members concerning all aspects of the election process shall be heard and determined by the election committee.” Board Policy 3-8 at page 1.

The Board has also provided for the following with respect to any remedies:

3. Remedies

If as a result of any timely protest filed, or any investigation undertaken by the Election Committee without regard to whether a timely protest has been filed, the Election Committee or Appeals Committee determines that any NYSNA election rules have been violated or that any other conduct has occurred which may prevent or has prevented a fair; honest and open election. The Election Committee or Appeals Committee, as applicable, may take whatever remedial action is appropriate.

These remedies are in addition to, and not in lieu of, the remedies that may be appropriately imposed following charges brought under the NYSNA Disciplinary Procedure.

4. Rerun Elections

Should the Election Committee or the Appeals Committee if an appeal to the Election Committee's decision is filed, refuse to certify any election, the Election Committee or Appeal Committee, as applicable, shall immediately order that a rerun election be held, including, if necessary, the rerunning of the nomination process. Upon receipt of the decision from the Election Committee or the Appeals Committee, the CEO will implement the rerun election as soon as feasibly possible. Rerun nominations and/or elections shall be conducted and administered by the Election Committee.

Board Policy 3-8 at pages 4-5.

To date, the Election Committee has met three times totaling more than 12 hours to consider over 40 separately cognizable protests filed by over 130 members. The Election Committee is continuing to conduct its investigation of protests and is seeking additional information with respect to certain protests from protesters and witnesses. The next meeting of the Election Committee is scheduled for October 14, 2011 at NYSNA's Latham, NY offices.

The Election Committee, with the exception of the election for one office discussed below, is presently neither able to certify any election nor able to refuse to certify any election and order a rerun election because the Committee's investigations of protests are ongoing and have yet to be concluded.

The one exception to the status of the Election Committee's ongoing investigations is the following. The Election Committee will not, because it cannot, certify the election for the office of president-elect because that office is for a four-year term under NYSNA Bylaws Article V, Section 3(a). The Office of Labor Management Standards of the United States Department of Labor notified NYSNA by letter dated August 19, 2011 (received August 22, 2011) that NYSNA is in violation of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") because that federal agency has "determined that NYSNA is a local labor organization as it has the structure of and performs the functions of a local and it does not have any subordinate labor organizations. It is the closest entity to the members and is thus a local." The Election Committee has received protests from members about this very issue, i.e., that the president-elect position with a four-year term is a violation of the LMRDA's requirement that a local labor organization must provide for the secret ballot election by the members for any office at least every three-years. The Election Committee therefore refuses to certify the election for the office of president-elect and is referring this matter to the Board for its review and action on amending the Bylaws so that they conform to the election term requirements of the LMRDA. Following action by the Board and the membership in amending the Bylaws to conform to the requirements of the LMRDA, the Election Committee will review this matter, including the ordering of the rerunning of the nomination process and a new election or the rerunning of the election.

Respectfully submitted,

Robert Warner, MS, RN, Chairperson  
Lukmon Kalejaiye, MS, RN-BC, CNS  
Monica King, MPH, RN  
Ellen LaDieu, MS, RN  
Patricia Matthews, MSN, RN