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**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

**HILDA L. SOLIS, Secretary of Labor, United States Department of Labor,**  
  
**Plaintiff,**  
  
**v.**  
  
**NATIONAL EMERGENCY MEDICAL SERVICES ASSOCIATION,**  
  
**Defendant.**

**1:11-cv-01929 AWI DLB**  
  
**ORDER RE DEFENDANT’S MOTION TO DISMISS (DOC. 15)**

**I. INTRODUCTION**

Plaintiff, Hilda L. Solis, the Secretary of the United States Department of Labor (the “Secretary”), brings this action under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (“LMRDA”), 29 U.S.C. §§ 481-483, requesting an order directing Defendant, the National Emergency Medical Services Association (“NEMSA”), to conduct an election for the offices of Vice President, Treasurer, California Bay Area Regional Director 1, California Bay Area Regional Director 2, California Valley Regional Director, Southern California Regional Director, and Northeast Regional Director under the supervision of Plaintiff. Doc. 19, First Amended Complaint (“FAC”), at ¶ 1. Defendant moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on the grounds that: (1) an election is currently being conducted by NEMSA for four of the positions listed above; and (2) the terms of the remaining three Directors do not expire until 2013. Doc. 15. Plaintiff opposes dismissal, arguing that: (1) NEMSA’s promises to cure by holding an election do not justify dismissal; and (2) NEMSA’s position that the three remaining Directors are not subject to re-election under LMRDA until 2013 is

1 without merit. Doc. 21. Defendant replied. Doc. 22. The motion was originally set for hearing on  
2 March 15, 2012, but the hearing was vacated and the matter submitted for decision on the papers.

## 3 4 **II. FACTUAL AND LEGAL BACKGROUND**

5 Passage of the LMRDA in 1959 “was based, in part, on a congressional finding ‘from recent  
6 investigations in the labor and management fields, that there have been a number of instances of breach  
7 of trust, corruption, disregard of the rights of individual employees, and other failures to observe high  
8 standards of responsibility and ethical conduct,’ ” requiring action to protect the rights of employees and  
9 the public. *Hall v. Cole*, 412 U.S. 1, 7-8 (1973) (citing 29 U.S.C. § 401(b)). “In an effort to eliminate  
10 these abuses, Congress recognized that it was imperative that all union members be guaranteed at least  
11 ‘minimum standards of democratic process....’ ” *Id.* (quoting 105 Cong. Rec. 6471 (1959) (Sen.  
12 McClellan)).

13  
14 Title IV of the LMRDA directs unions to conduct regularly-scheduled officer elections. 29  
15 U.S.C. § 481. A “national” or “international” labor organization must elect its “officers”<sup>1</sup> “not less often  
16 than once every five years....” § 481(a). A “local” labor organization must elect its officers “not less  
17 often than once every three years....” § 481(b).<sup>2</sup> So long as an organization’s constitution and bylaws  
18 are not inconsistent with the LMRDA, elections should be conducted in accordance with the  
19 organization’s founding documents. § 481(e).

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21  
22 <sup>1</sup> The LMRDA defines “officer” as “any constitutional officer, any person authorized to perform the functions of president,  
23 vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive  
24 board or similar governing body.” 29 U.S.C. § 402(n). It is alleged, and appears to be undisputed, that all of the offices in  
25 dispute in this case (Vice President, Treasurer, and Regional Directors) are “officers” under this definition. Although the  
26 Bylaws are confusingly drafted, it appears that each Regional Director sits on NEMSA’s Board of Directors, which qualifies  
27 each as an “officer” by virtue of membership on NEMSA’s governing body. FAC at ¶ 16.

28 <sup>2</sup> The statute does not define the terms “national,” “international,” or “local” labor union. The First Amended Complaint  
alleges that NEMSA is a “local” labor union because it performs the functions of a local union and does not have any  
subordinate local unions. FAC at ¶ 7; *see also* Doc. 21 at 3 n.1 (citing *Donovan v. Nat’l Transient Division, Int’l Broth. of  
Boilermakers*, 726 F.2d 618 (10th Cir. 1984)). NEMSA denies this, arguing that it is a “national” labor union “representing  
emergency medical services employees across the nation....” Doc. 15 at 3. However, NEMSA also admits that its bylaws  
require an election for all of the positions in question every three years, rendering any dispute over the characterization of  
NEMSA irrelevant for determining the appropriate term length of the challenged positions. Doc. 15 at 7 (citing Bylaws, Art  
VI, § 3).

1 Here, it is undisputed that NEMSA's bylaws provide for election of all officers every three years.  
2 Bylaws, Art. VI, § 7. The Bylaws also provide that the terms of office for all Directors shall be  
3 "staggered so that fifty percent (50%) plus one of the exact number of directors... are elected in even  
4 numbered years." *Id.* The Bylaws further provide that directors and officers shall be elected by "a  
5 secret ballot ... distribut[ed] to all members ... collect[ed] ... during the week preceding the June 1st  
6 membership meeting ('election week') and ... tabulated and posted at the June 1st membership meeting."  
7 *Id.*, Art VIII, § 1(A)-(B).

8  
9 When NEMSA was established in 2004, it had four constitutional officers: President, Vice  
10 President, Secretary and Treasurer. FAC at ¶ 12. Between 2004 and 2007, there were no Regional  
11 Directors. FAC at ¶ 15A. In August 2007, the positions of California Valley Regional Director and  
12 California Bay Area Regional Director 1 were created. FAC at ¶ 15B. Individuals were appointed from  
13 each region to fill these positions for three-year terms. *See* Doc. 16, Declaration of Torren K. Colcord,  
14 at ¶ 10.<sup>3</sup> In August 2010, the positions of Bay Area Regional Director 2, Southern California Regional  
15 Director, and Northeast Regional Director were created. FAC at ¶ 15C. Again, individuals were  
16 appointed to fill these positions for three-year terms. *See* Doc. 16, Colcord Decl., at ¶ 10.

17  
18 With respect to the Vice President and Treasurer positions created in 2004, NEMSA has not  
19 conducted an election since in 2008. FAC at ¶ 14. The FAC alleges that Defendant was required to  
20 conduct an election for these positions in June 2011. *Id.* This did not occur. *Id.*

21  
22 With respect to the two Regional Directorships created in 2007 (Valley and Bay Area Position  
23 1), the FAC alleges, and NEMSA does not dispute, that elections were required in June 2010. FAC at ¶  
24 17. No such election took place. *Id.*

25  
26 <sup>3</sup> Defendant offers the Declaration of Torren K Colcord, NEMSA's Executive director, *see* Doc. 16 at ¶1, along with its  
27 motion to dismiss for lack of subject matter jurisdiction. A Court may review evidence beyond the complaint in order to  
28 resolve a factual attack on subject matter jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).  
The Court notes that Mr. Colcord confusingly states that these two Directorships were created in 2007, *see id.* at ¶ 9, while  
also stating that because the terms of these positions expired in 2007, they were subject to election in 2007, *see id.* at ¶ 11.

1 With respect to the three Regional Directorships created in August 2010, the FAC alleges that  
2 elections were required in June 2011. *Id.* No such election took place. *Id.*

3 After first exhausting any remedies available under a labor organization’s constitution and  
4 bylaws, and within one month of exhaustion, any member of that labor organization may file a  
5 complaint with the Secretary alleging a violation of the LMRDA’s election requirements. 29 U.S.C.  
6 482(a). The LMRDA directs the Secretary to:

8 [I]nvestigate such complaint and, if [s]he finds probable cause to believe that a violation  
9 of this subchapter has occurred and has not been remedied, [s]he shall, within sixty days  
10 after the filing of such complaint, bring a civil action against the labor organization as an  
11 entity in the district court of the United States in which such labor organization maintains  
12 its principal office to set aside the invalid election, if any, and to direct the conduct of an  
election or hearing and vote upon the removal of officers under the supervision of the  
Secretary and in accordance with the provisions of this subchapter and such rules and  
regulations as the Secretary may prescribe.

13 29 U.S.C. § 482(b). Here, the FAC alleges that NEMSA member, Louis Nizzari, protested the above  
14 described electoral conduct, pursued all available administrative remedies, and timely filed a complaint  
15 with the Secretary. *Id.* at ¶¶ 19-26. The Secretary investigated the complaint and found probable cause  
16 to believe NEMSA violated the LMRDA and that any such violations had not been remedied as of the  
17 date this case was filed. *Id.* at ¶ 27.

18 If, “upon a preponderance of the evidence after a trial upon the merits, the court finds ... that an  
19 election has not been held within the time prescribed by [LMRDA] section 481 ... the court shall declare  
20 the election, if any, to be void and direct the conduct of a new election under supervision of the  
21 Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the  
22 labor organization.” 29 U.S.C. § 482(c).

### 23 **III. STANDARDS OF DECISION**

#### 24 **A. Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.**

25 Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action for “lack of  
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1 jurisdiction over the subject matter.” Faced with a Rule 12(b)(1) motion, a plaintiff bears the burden of  
2 proving the existence of the court's subject matter jurisdiction. *Thompson v. McCombe*, 99 F.3d 352,  
3 353 (9th Cir. 1996). A federal court is presumed to lack jurisdiction in a particular case unless the  
4 contrary affirmatively appears. *Gen. Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968, 968–69 (9th  
5 Cir. 1981).

6  
7 A challenge to subject matter jurisdiction may be facial or factual. *White v. Lee*, 227 F.3d 1214,  
8 1242 (9th Cir. 2000). As explained in *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1038 (9th Cir.  
9 2004):

10 In a facial attack, the challenger asserts that the allegations contained in a complaint are  
11 insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack,  
12 the challenger disputes the truth of the allegations that, by themselves, would otherwise  
13 invoke federal jurisdiction.

14 In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint  
15 without converting the motion to dismiss into a motion for summary judgment. *Savage v. Glendale*  
16 *Union High School*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003); *McCarthy v. United States*, 850 F.2d 558,  
17 560 (9th Cir. 1988). “If the challenge to jurisdiction is a facial attack, i.e., the defendant contends that  
18 the allegations of jurisdiction contained in the complaint are insufficient on their face to demonstrate the  
19 existence of jurisdiction, the plaintiff is entitled to safeguards similar to those applicable when a Rule  
20 12(b)(6) motion is made.” *Cervantez v. Sullivan*, 719 F. Supp. 899, 903 (E.D. Cal. 1989), rev'd on other  
21 grounds, 963 F.2d 229 (9th Cir. 1992). “The factual allegations of the complaint are presumed to be  
22 true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter  
23 jurisdiction.” *Id.*

24 The standards used to resolve motions to dismiss under Rule 12(b) (6) are relevant to disposition  
25 of a facial attack under 12(b)(1). *See Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 n. 2 (9th Cir.  
26 2009), rev'd on other grounds en banc, 616 F.3d 1019 (9th Cir. 2010) (applying *Ashcroft v. Iqbal*, 556  
27 U.S. 662, 129 S. Ct. 1937 (2009), to a motion to dismiss for lack of subject matter jurisdiction).  
28

1 **Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim.**

2 Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks sufficient facts to  
3 support a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1990).  
4 To sufficiently state a claim to relief and survive a 12(b)(6) motion, the pleading “does not need detailed  
5 factual allegations” but the “[f]actual allegations must be enough to raise a right to relief above the  
6 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Mere “labels and  
7 conclusions” or a “formulaic recitation of the elements of a cause of action will not do.” *Id.* Rather,  
8 there must be “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570. In other  
9 words, the “complaint must contain sufficient factual matter, accepted as true, to state a claim to relief  
10 that is plausible on its face.” *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949 (internal quotation marks omitted).  
11

12 The Ninth Circuit has summarized the governing standard, in light of *Twombly* and *Iqbal*, as  
13 follows: “In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and  
14 reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to  
15 relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks omitted).  
16 Apart from factual insufficiency, a complaint is also subject to dismissal under Rule 12(b)(6) where it  
17 lacks a cognizable legal theory, *Balistreri*, 901 F.2d at 699, or where the allegations on their face “show  
18 that relief is barred” for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215 (2007).  
19

20 In deciding whether to grant a motion to dismiss, the court must accept as true all “well-pleaded factual  
21 allegations” in the pleading under attack. *Iqbal*, 129 S. Ct. at 1950. A court is not, however, “required  
22 to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
23 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).  
24

25 **IV. DISCUSSION**

26 **A. Subject Matter Jurisdiction.**

27 Defendant argues that this Court lacks subject matter jurisdiction over the Secretary’s claims  
28

1 concerning California Bay Area Regional Director Position 2, Southern California Regional Director,  
2 and Northeast Regional Director. NEMSA argues that because these three Directors were appointed to  
3 their positions on August 5, 2010 and have not yet been in office for three years, this Court lacks  
4 enforcement authority over these positions. Doc. 15 at 8-10. The Secretary disagrees with Defendant's  
5 interpretation of the law and maintains that each of these three Regional Director positions should have  
6 been the subject of an election in June 2011. FAC ¶ 17; Doc. 21 at 6-9.

8 NEMSA's arguments are merits-based and do not amount to a subject matter jurisdiction  
9 challenge. This Court has subject matter over this case pursuant to 28 U.S.C. § 1331, which provides  
10 that a district court "shall have original jurisdiction [over] all actions arising under the Constitution,  
11 laws, or treaties of the United States." Only under very narrow circumstances can a merits challenge  
12 undermine federal subject matter jurisdiction under § 1331:

13  
14 It is firmly established in our cases that the absence of a valid (as opposed to arguable)  
15 cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or  
16 constitutional power to adjudicate the case. [Citations.] As we stated in *Bell v. Hood*, 327  
17 U.S. 678, 682 (1946), "[j]urisdiction ... is not defeated ... by the possibility that the  
18 averments might fail to state a cause of action on which petitioners could actually  
19 recover." Rather, the district court has jurisdiction if "the right of the petitioners to  
20 recover under their complaint will be sustained if the Constitution and laws of the United  
21 States are given one construction and will be defeated if they are given another," *id.*, at  
22 685, unless the claim "clearly appears to be immaterial and made solely for the purpose  
23 of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.*,  
24 at 682-683; [additional citations]. Dismissal for lack of subject-matter jurisdiction  
25 because of the inadequacy of the federal claim is proper only when the claim is "so  
26 insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise  
27 completely devoid of merit as not to involve a federal controversy." *Oneida Indian*  
28 *Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 666 (1974); [additional citations].

*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998).

23 Here, among other arguments, the Secretary points out that it has been the Department of  
24 Labor's long-established position that unions may fill newly-created offices by appointment, but such  
25 appointees may only serve until the union's next regularly-scheduled election. See Doc. 21-1.  
26 Defendant has failed to demonstrate that the Secretary's position is so insubstantial, implausible,  
27 foreclosed by any, prior, binding decisions (let alone any decision of the United States Supreme Court),  
28

1 or otherwise completely devoid of merit as to not involve a federal controversy.

2 Defendant's motion to dismiss for lack of subject matter jurisdiction is DENEID.

3  
4 **B. Failure to State a Claim.**

5 Defendant also moves to dismiss the FAC for failure to state a claim. Defendant concedes  
6 timely elections have not been held for the positions of Vice-President, Treasurer, and two of the five  
7 Regional Directorships (California Bay Area 1 and California Valley). Defendant claims instead that it  
8 is "currently holding" unsupervised elections for these five positions and therefore that there is no need  
9 for Court intervention. As to the remaining three Directorships, Plaintiffs maintain elections are not  
10 required until August 2013.

11  
12 **1. Significance of Defendant's Planned Unsupervised Elections.**

13 NEMSA does not dispute that the positions of California Bay Area Regional Director 1, and  
14 California Valley Regional Director were due for election as of June 2010. Nor does NEMSA dispute  
15 that no such election has occurred, in 2010 or otherwise. *See* Doc. 14 at 4 (indicating these two  
16 Directorships were established in 2007, but stating that NEMSA's July 2010 election was for the  
17 President and Secretary positions only). NEMSA also does not dispute that the Vice President and  
18 Treasurer positions were due for election in June 2011, but that no election occurred that year. *Id.*<sup>4</sup>

19  
20 NEMSA claims it is "currently holding elections" for the positions of Vice President, Treasurer,  
21 California Bay Area Regional Director 1, and California Valley Regional Director. Doc. 16, Colcord  
22 Decl., at ¶ 19. However, NEMSA fails to provide any detail about this assertion. When are they set to  
23 occur? Have they occurred already? NEMSA suggests only that "[c]ourts have not ruled out the  
24 possibility that an unsupervised election will cure the defects brought in a 29 U.S.C. § 481 action." Doc.  
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26 <sup>4</sup> NEMSA offers as an excuse for failing to timely conduct an election in June 2011 the fact that a lawsuit was filed in this  
27 Court on March 28, 2011 challenging the conduct of the July 2010 NEMSA Presidential election. *Solis v. NEMSA*, 1:11-cv-  
28 00529 AWI GSA. NEMSA does not explain, however, why this lawsuit should affect NEMSA's duty to timely conduct  
elections. Nor does a lawsuit filed in March 2011 even arguably excuse the failure to timely conduct elections for California  
Bay Area Regional Director 1 and California Valley Regional Director, which were due in June 2010.



1 15 at 10. In support of this position, NEMSA cites *McLaughlin v. Lodge 647, Int'l Broth. of*  
2 *Boilermakers, Iron Ship Builders, Blacksmiths Forgers & Helpers, AFL-CIO*, 876 F.2d 648, 651 (8th  
3 Cir. 1989),<sup>5</sup> in which the Eighth Circuit found a district court may refuse to order a supervised election  
4 under certain circumstances. In that case, while the suit was pending, the union “proceeded with its next  
5 regularly scheduled election.” *Id.* at 650. The Secretary “refused an offer from the union to observe  
6 [the] election and supervise the distribution of campaign literature....” *Id.* Instead, the union hired a  
7 “neutral labor relations consultant, a former Department of Labor administrator, to provide advice prior  
8 to and during the election and to observe the actual election process.” *Id.* In addition “the union  
9 eliminated the meeting-attendance eligibility rule being challenged by the Secretary as unreasonable....”  
10 *Id.* Under those circumstances, the Eighth Circuit found the district court had “narrow equitable  
11 discretion” to refuse the Secretary’s request for a supervised election. *Id.* at 650, 655.

12  
13  
14 Here, the record does not present such a compelling fact pattern. NEMSA claims to be “moving  
15 forward” with elections for the positions of Vice President, Treasurer, Bay Area Regional Director 1,  
16 and Valley Regional Director, the elections that were due to take place in June 2010. However,  
17 NEMSA provides no detail about those plans.<sup>6</sup> NEMSA has failed to demonstrate that *McLaughlin* is  
18 factually analogous.

19  
20 Even more damaging to NEMSA’s argument is the fact that the Ninth Circuit has declined to  
21 adopt the Eighth Circuit’s flexible interpretation of LMRDA’s election mandate. *Hodgson v. Local*  
22 *Union 400, Bakery and Confectionery Workers' Intern. Union of America, AFL-CIO*, 491 F.2d 1348,  
23 1350 (9th Cir. 1974), clearly rejected a defendant union’s argument that its unilateral act of holding an  
24 election deprived the Secretary of her right to a court-ordered supervised election. *See also Chao v.*

25 <sup>5</sup> NEMSA also cites *Wirtz v. Glass Bottle Blowers Ass’n*, 389 U.S. 463, 468 (1968), which generally cautions “against a  
26 literal reading of congressional labor legislation” because “such legislation is often the product of conflict and compromise  
27 between strongly held and opposed views,” and provides the unsurprising corollary holding that interpretation of the  
28 LMRDA may require reference to its legislative history.

<sup>6</sup> NEMSA makes reference to the Secretary’s apparent refusal of NEMSA’s settlement offer to allow the Secretary to  
supervise this election. *See Doc. 16 at 12.* This is an improper reference to confidential settlement negotiations and will not  
be considered.

1 *Branch 4798 Nat. Ass'n of Letter Carriers*, 532 F. Supp. 2d 783, 790 & n.13 (E.D. Va. 2008)  
2 (acknowledging circuit split). In this Circuit, even if NEMSA had already held its unilateral election,  
3 the Secretary still has a right to a court-ordered supervised election. *See Hodgson*, 491 F.2d at 1351 (so  
4 holding notwithstanding potential waste of resources).

5 NEMSA's motion to dismiss for failure to state a claim on the ground that it plans to hold  
6 elections is DENIED.

7  
8 **2. NEMSA's Argument that the Three Directorships Created in 2010 Are Not Subject**  
9 **to Election Until 2013.**

10 NEMSA next argues that the claims concerning the California Bay Area Regional Director  
11 Position 2, Southern California Regional Director, and Northeast Regional Director should be dismissed  
12 because these three Directorships are not subject to election until 2013. Doc. 15 at 8-10. In essence,  
13 NEMSA argues these claims are subject to dismissal under Rule 12(b)(6) because the Secretary lacks a  
14 cognizable legal theory. *See Balistreri*, 901 F.2d at 699.

15  
16 The Secretary maintains that, even though individuals were appointed to these newly-created,  
17 three-year positions in 2010, because they were appointed, not elected, in the first instance, NEMSA  
18 was required to subject the positions to election in June 2011. In support of this contention, the  
19 Secretary first cites 29 C.F.R. § 452.14 for the "principle that newly appointed officers may only serve  
20 until a union's next regularly scheduled election." But, section 452.14 only applies to newly-formed or  
21 merged unions. NEMSA is neither.

22  
23 More compelling is the Secretary's reference to the Department of Labor's long-established  
24 position that unions may fill newly-created offices by appointment, but such appointees may only serve  
25 until the union's next regularly-scheduled election. The Secretary cites a March 22, 2011 letter to a  
26 union the name of which has been redacted. That letter states:

27 The [LMRDA] regulates the frequency and manner of holding regular periodic elections  
28 of officers by a labor organization but does not purport to establish statutory conditions

1 for the creation of new offices or attempt to limit a labor organization’s ability to  
2 reorganize itself. As such, the Act does not prohibit the union from considering these  
3 newly-created offices to be vacancies, which may be filled by appointment to serve until  
4 the next regularly scheduled election, at which point any newly-created officer positions  
5 must be open to all members for nomination and election. *See* 29 C.F.R. § 452.25.

6 Doc. 21-1, Ex. 1. Unlike 29 C.F.R. § 452.14, section 452.25 applies to all labor organizations, generally  
7 providing that, while “Title IV governs the regular periodic elections of officers in labor organizations  
8 subject to the Act ... [n]o requirements are imposed with respect to the filling by election or other  
9 method of any particular office which may become vacant between such regular elections.” Section  
10 452.25 provides the following specific example.

11 If, for example, a vacancy in office occurs in a local labor organization, it may be filled  
12 by appointment, by automatic succession, or by a special election which need not  
13 conform to the provisions of Title IV. The provisions of section 504 of the Act, which  
14 prohibit certain persons from holding office, are applicable to such situations. While the  
15 enforcement procedures of section 402 are not available to a member in connection with  
16 the filling of an interim vacancy, remedies may be available to an aggrieved member  
17 under section 102 of the Act or under any pertinent State or local law to any vacancies  
18 occurring in a “local labor organization.”<sup>7</sup>

19 Section 425.25 only addresses the extent to which a labor organization may fill a vacant position by  
20 appointment. It does not explicitly address when positions filled by appointment must be put to election.  
21 The Secretary’s March 22, 2011 letter advances the interpretation that positions filled by appointment  
22 must be put to election at the next regularly-scheduled election. The Secretary points to a similar  
23 interpretation advanced in an October 12, 1978 Opinion of the Solicitor of Labor. *Id.*, Ex. 2. Agency  
24 interpretations “contained in formats such as opinion letters are ‘entitled to respect’ under [] *Skidmore v.*  
25 *Swift & Co.*, 323 U.S. 134, 140 (1944).” *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

26 Finally, the Secretary points to language in NEMSA’s bylaws requiring “all directors and  
27 officers to be elected.” Bylaws, Art. VII, § 1 & 2. Although Article VII, section 4(D) permits NEMSA  
28 to make appointments to fill vacancies, the Secretary argues that nothing in the bylaws shields

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<sup>7</sup> Whether section 452.25 was meant to apply only to “local” labor organizations or whether the discussion of local organizations is provided simply as an example is unclear. The FAC alleges that NEMSA is a local union. FAC at ¶ 7. NEMSA disputes this, any such dispute is more appropriately resolved at the summary judgment stage.

1 appointees from being replaced at the next scheduled election. The Secretary also argues that NEMSA's  
2 failure to subject the three 2010 appointees to election in June 2011 violates with the provision in  
3 NEMSA's bylaws requiring staggered elections:

4 Directors shall be elected by the members to hold office for three (3) years. The terms of  
5 office shall be staggered so that fifty percent (50%) plus one of the exact number of  
6 directors fixed by the Board . . . are elected in even numbered years. The president and  
7 secretary shall be elected in odd numbered years and the vice-president and treasurer  
8 shall be elected in even numbered years.

9 Bylaws, Art VI, § 7.

10 The only authority NEMSA cites to refute the Secretary's arguments is *Talley v. Reich*, 1993 WL  
11 483192 (E.D. Pa. Nov. 23, 1993), which simply quotes 29 C.F.R. 425.25 for the proposition that the  
12 "filling of interim vacancies" by local labor organizations "are not subject to the provisions of Title IV,  
13 and thus, such vacancies may be filled by means other than election, including appointment." Section  
14 425.25 says nothing about what happens after a vacancy is filled. It is the Secretary's established  
15 position that appointees must be subject to election at the next regularly scheduled opportunity.  
16 NEMSA has presented nothing to undermine this administrative opinion, which warrants *Skidmore*  
17 deference. The Secretary's claims regarding these three positions are based upon a cognizable legal  
18 theory. Defendant's motion to dismiss is DENIED.

19 **V. CONCLUSION AND ORDER**

20 For the reasons set forth above, Defendant's motion to dismiss is DENIED.

21  
22  
23  
24 IT IS SO ORDERED.

25 Dated: April 10, 2012

26   
27 \_\_\_\_\_  
28 CHIEF UNITED STATES DISTRICT JUDGE