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**A T T O R N E Y C L I E N T P R I V I L E G E D
& C O N F I D E N T I A L**

M E M O R A N D U M

**TO: SEIU Local 503 President Joe DiNicola
SEIU Local 503 Executive Director Leslie Frane**

FROM: Robert Weinberg & Alice O'Brien

DATE: April 9, 2007

RE: SEIU Local 503 Overtime Inquiry

We are writing to respond to the questions that have been raised regarding the legality of Local 503 incurring liability for retroactive and future overtime or compensatory time claimed by President DiNicola for his work as Local 503 President for the entire duration of his two terms in union office. For the period from November 2004 to the present, the Local's liability for the overtime sought would be in excess of \$113,500 if calculated on a straight hourly basis. Specifically, Executive Director Frane and President DNicola have asked us to respond to the following three questions:

1. "What are the potential implications under Section 501 of the LMRDA (and any related statutes or considerations that may be applicable) to the potential receipt by the current union President of Local 503 of overtime/comp time compensation for

hours worked in his capacity as Union President in excess of 40 per week or 8 per day since the beginning of his term on 11/24/04? That evaluation and assessment should address the issues surrounding the contractual rights and obligations arising out of an agreement designated as "Agreement 1281" and any other contracts, documents or materials you may deem relevant."

2. "What, if any, legal implications (under Sec. 501 or otherwise) arise out of the fact that the President has, since the March 10, 2007 Executive Session of the Board, submitted his February 2007 time sheet and "amended" time sheets for his entire tenure as President to the Department of Revenue with such time sheets containing all claimed hours worked in excess of 8 per day or 40 per week for those periods?"
3. "Does SEIU Local 503, OPEU, any officer of SEIU Local 503, OPEU or any staff employed by SEIU Local 503, OPEU, face any potential liability under state or federal wage and hour laws or contract law as a consequence of:
 - a. Instructing the current union President to keep two different sets of time records and instructing him to submit timesheets with inaccurate and incomplete reports of hours worked to his employer, the Oregon Department of Revenue?
 - b. Refusing to sign the President's Department of Revenue timesheets that accurately reflect his actual hours worked consistent with all hours worked by the President and approved for entry into the SEIU Local 503, OPEU Timekeeper time cost system?"

Before turning to our legal analysis of those questions, we first set forth our factual findings based on our review of all the documents that have been provided to us by President DiNicola, Executive Director Frane, former President Best, current Human Resource Director DeLauder, Finance Director Greer and Supervising Attorney Stefan, our interviews with each of these individuals and, as well, our interviews with Secretary-Treasurer Burgin and former President Spence. A full description of the documents these individuals provided, and the topics discussed with each, is provided in the margin below. We also called both Janelle Lipscombe and Sandra McLernan at the Oregon Department of Revenue ("Revenue"), but were unable to reach them in the short period of time allotted for our review. In the interests of ensuring that we had not overlooked any relevant information, we discussed with President DiNicola and his counsel, Kevin Lafky, the individuals we had interviewed in the course of our review, and asked them to provide us with the names of any other individuals whom they believed we should contact to complete our review. Neither President DiNicola nor his counsel provided any additional names.¹

¹ We interviewed both Executive Director Frane and President DiNicola extensively about the questions they had raised and their respective understandings of the amount and manner in which Local 503 compensates its President. We conducted much shorter interviews with the remaining individuals. We discussed with former Presidents Spence and Best the compensation they had received during their respective tenures as Local 503 President and any discussions that they had had with President DiNicola about the compensation arrangements for Local 503's President. We discussed with Finance Director Greer why compensatory time liability is not reported on Local 503's LM-2 report, the amount that Local 503 reimburses Revenue per hour of time worked by President DiNicola, and the total compensation

Factual Findings

President DiNicola was elected President of Local 503 in November of 2004, and was reelected to that post in November of 2006. As the Local 503 Constitution provides that the President may serve for only two consecutive two year terms (see Ex. A, Local 503 Const., Art. VII, §7), President DiNicola will step down from that post in November of 2008.

A. The Relevant Governing Provisions in the Local 503 Constitution, Bylaws & Administrative Policies and Procedures

As President, Mr. Nicola serves as one of five statewide officers of local 503, id., § 2, as a member of the Local 503 Board of Directors ("Board"), id. § 1, and as a member of the Local 503 Executive Committee, id. Local 503 Bylaws, Art. VIII. The Board is "the governing body of the Union between sessions of the General Council," id., Local 503 Const., Art. VIII § 2, and is vested with authority over "the administration" of Local 503, id., Art. IX, § 1. The Executive

provided to President DiNicola. We asked Human Resource Director DeLauder to provide us with the paperwork that was filled out for President DiNicola when he began his duties at Local 503, and to provide us with the paperwork that was given to President DiNicola at that time. We asked Supervising Attorney Stefan to provide us with certain documents that had been mentioned by others in our interviews with them (e.g., the lost time arrangements under which former Presidents Best and Spence were compensated).

The documents reviewed consist of the following: (i) the Local 503 Constitution and Bylaws; (ii) the Local 503 Administrative Policies & Procedures; (iii) the personnel documents that were filled out when President DiNicola began his Local 503 duties and the related personnel documents that were provided to him at that time; (iv) the SEIU Timekeeper sheets that President DiNicola has filled out since he began his duties at Local 503; (v) two email exchanges between President DiNicola and Executive Director Frane regarding whether or not certain weekend hours President DiNicola worked should count for purposes of accruing compensatory time under Local 503's policies; (vi) a summary sheet of the total payments made by Local 503 to, or on behalf of President DiNicola, since November of 2004; (vii) the current collective bargaining agreement between Local 503 and the Department of Administrative Services ("DAS Contract"); (viii) Agreement 1281 between Local 503 and Revenue implementing the lost time arrangement for President DiNicola and the initial draft of that agreement; (ix) the analogs to Agreement 1281 that implemented the lost-time arrangements for former Presidents Best and Spence; (x) the current collective bargaining agreement between Local 503 and its staff (or "PERU") contract; (xi) three monthly reimbursement requests by Revenue to Local 503 for payments made to, or on behalf of, President DiNicola; (xii) summaries of the benefits Local 503 has provided to President DiNicola throughout his tenure including the expense reimbursements he has received, and the compensatory time he has accrued and taken under Local 503's policies; (xiv) the time sheet that President DiNicola submitted to Revenue in March seeking compensation for 96 hours of overtime for the February pay period; (xv) the transcript of the Executive Board Session held on March 10, 2007; (xvi) the packet that President DiNicola submitted to Revenue after that meeting seeking compensation for 2,596 hours of overtime, which includes amended Revenue time sheets for November of 2004 through January of 2007, President DiNicola's SEIU Timekeeper sheets for that same time period, and a cover note from President DiNicola to Revenue; (xvii) President DiNicola's proposed Addendum to Agreement 1281, which would grant him the right "to 'cash out' any or all accrued comp time"; and (xviii) Local 503's Letter to Revenue dated March 19, 2007 advising Revenue that Local 503 had not approved the overtime that President DiNicola had requested and that Local 503 would not reimburse Revenue if it paid that overtime unless and until Local 503 determined that the hours were properly reimbursable by the Local.

Committee is "the governing body between meetings of the Board," id., Art. VIII, § 3.

The Local 503 Bylaws further specify that the President is to "preside [] at all meetings of the General Council, Board, and Executive Committee," "set the agenda for Board meetings and act as the Board administrator, "serve "as the chief spokesperson for the Union, " appoint and dissolve (for cause) all Special committees, appoint "members of Standing and Special committees" (subject to Board ratification), represent Local 503 at all "appropriate national or regional meetings," represent the union "at the Legislature an in ballot measure campaigns," "chair the Union's Grievance Appeals Committee," id., Art. X, § 1 (a-o), "appoint members of all General Council committees and designate the chairpersons thereof" subject to Board confirmation, id., Art. XVI, § 10(c). The President is also obligated to "annually sign and file at Headquarters a financial report containing [certain] information in such detail as may be necessary accurately to disclose the Union's financial condition and operations for the preceding fiscal year" including information regarding outstanding liabilities and amounts disbursed, directly or indirectly, on behalf of each officeholder Id., Art. I, § 1(b).

Neither the Local 503 Constitution, nor the Bylaws, grant the President authority over the union's expenditures. Rather Local 503's governing documents grant that authority to the Board of Directors, between General Councils, id., Art. IX § 1(a), and, on a day to day basis, to the Local 503 Executive Director acting with the approval of the Executive Committee, id., Art. X, § 5(a). See also Ex. B, Local 503 Administrative Policies & Procedures ("Local 503 Policies"), Art. VII, § 2. Expenditures of over \$7,500, however, must be approved by the Board. See Ex. B, Local 503 Policies, Art. VII, § 2.

With respect to the President's hours of work and compensation, the Local 503 Constitution does not address the matter. The Local 503 Bylaws, however, expressly provide that the President "shall serve on an *up to full-time basis* during the term of office" and "shall receive no salary other than salary provided by SEIU Local 503, OPEU or an employer whose employees are represented by SEIU Local 503." Ex. A, Local 503 Bylaws, Art. X, § 1(p-q) (emphasis added). The Local 503 Bylaws further specify that "the Union shall compensate the Union President at a rate of \$400 per month." Id., Art. XVI, § 15. The other elected statewide officers of the union receive no compensation for their work for the union other than reimbursements of their expenses and, in the case of the Secretary-Treasurer, a nominal monthly stipend of \$130. Id.

The Local 503 Administrative Policies & Procedures ("Local 503 Policies") reiterate that the "President shall be paid a salary (through their respective employer if available) during his/her term of office" and specify that "the Union will reimburse the employer through invoice for all salary expenditures." Ex. B, Local 503 Policies, Art. V, § 21. The Local 503 Policies also specify that "SEIU Local 503, OPEU will hold harmless and make whole any past president or future president from financial loss, as determined at the time they complete their term of office, in their retirement plan due to lost time for service as president." Id.

The President is also entitled, under Local 503's Policies, to receive the same reimbursements for meals, lodging, travel, telephone, postage and other Union business incidentals as other Board members. Id., Art. V, §§ 3 10. The Policies further provide that "[b]enefits for staff covered by the collective bargaining agreement, shall also apply to excluded

staff . . .” Id. Art. XIV, § 2. As a matter of policy, those same benefits have been extended to the Local 503 President. The collectively bargained benefits that are provided as a matter of policy to the President include meal, lodging and expense reimbursements (including reimbursements for spousal lodging under some circumstances), mileage reimbursements and car allowances, and compensatory time under certain circumstances. See Ex. C, PERU Contract, Arts. 12, 32. Specifically, compensatory time is provided for the week between Christmas and New Year's, as well as up to 10 hours per day for certain work performed *on the weekend*. Id., Art. 12 (emphasis added). Such compensatory time, however, is accrued on an hour per hour basis, may not be cashed out, and must be taken within three months or it is lost. Id.

B. The Consistent Past Practice of Local 503 with Respect to its President's Compensation & Accrual of Compensatory

In accordance with the governing guidelines just described, Local 503's consistent practice with respect to the compensation of its full time Presidents (beginning with Karla Spence in November of 1996) has been to compensate them under a three tier system. First, Presidents have received the salary (without overtime), basic benefits (pension and health insurance), and vacation and sick leave accruals, which they received on their prior job, pursuant to collectively bargained lost time arrangements between Local 503 and the relevant employer, Second, Presidents have received the \$400 monthly stipend for their services authorized by the Local 503 Bylaws. Third, as authorized by the Local 503 Policies, Presidents have receive the same benefits extended to excluded staff, which now include expense reimbursements, mileage reimbursements, car allowances, a flexible medical benefit and compensatory time for certain weekend work.²

Salary payments to Presidents are actually made by the President's state employer, whom Local 503 is then obligated to reimburse for all employment related expenditures under the relevant collective bargaining agreement and subsidiary agreement that implements the lost time provision for a particular President. For example, the lost-time arrangement under the collective bargaining agreement applicable to former President Best provided that the “Union President . . . shall, at [his/her] request, be given release time from [his/her] position[] for a period not to exceed the term of his/her office for the performance of Union duties directly related and central to the collective bargaining relationship” and further specified that the “Union shall . . . reimburse the Employer for payment of salary, benefits, paid leave time, pension, and all other Employer-related costs.” Oregon University System Contract (“OUS Contract”), Article 10, § 13. The subsidiary agreement, between Local 503 and the Oregon Institute of Technology (“OIT”), provided that the President had to “report *all work time* and use of paid leave on a monthly basis to [OIT],” which, in turn, had to “continue to pay the President her salary, benefits, paid leave time, pension and *all other* regular employment-related costs.” Ex. D, Letter of Agreement (dated Nov. 17, 2000) (emphasis added). Local 503, in turn, was obligated to “fully reimburse the Employer for payment of salary, benefits, paid leave time, pension and *all other* regular Employer-related costs . . .” Id. (emphasis added).

Even though the relevant collective bargaining agreements entitled prior Presidents to

² In addition, Former President Best received a supplement to her base salary during her tenure as President, which the Board approved (without her participation) in order to ensure that she was paid at a rate of no less than “step 6 of the organizers” salary chart. . . .” Ex. B, Local 503 Policies, Art. 5 , § 21.

receive either compensatory time (in the case of former President Spence), or overtime pay (in the case of former President Best) for their work for the State, neither they (nor former President Padilla) requested or received compensatory time or overtime for the hours they worked over a forty hour workweek during their respective tenures as President. Rather, prior Presidents have requested, and received, only the compensatory time that the Local 503 Policies afford them – namely, the right to take compensatory time off for certain work performed on the weekend. Accordingly, throughout her tenure in office, former President Best reported to OIT only that she had worked forty hours per week, not all hours she had actually worked, and received from OIT only pay for a regular forty hour week, not overtime pay for the hours she worked above and beyond a regular forty hour work week.³

For purposes of determining what, if any, compensatory time a President accrues under Local 503's policies, Local 503 uses its own recordkeeping system. Since former President Best's tenure as President, Local 503 has used the SEIU Timekeeper computer system to track all time worked for the union including the time worked by its President. Individuals enter the hours that they have worked into the computer system, together with descriptions of the work performed. A message is then sent to their supervisor, asking their supervisor to review and approve those hours that qualify (namely, certain weekend hours) for compensatory time. If the relevant supervisor does not approve the hours, the computer system notifies the individual, whom submitted the hours, that the hours have not been approved for compensatory time. At any time, an individual who submits his hours into the SEIU Timekeeper system can pull up a screen on his or her computer, which shows how many hours of approved compensatory time he or she has earned and, as well, when those hours of compensatory time will expire under the PERU Contract guidelines (which provide that an individual must use, or lose, his or her compensatory time within 90 days of accruing that time, see Ex. C, PERU Contract, Art. 12).

The SEIU Timekeeper system is used not only to determine what weekend work is eligible for compensatory time, but to make overall determinations as to what percentage of work performed for the union on various tasks is chargeable (or not) to agency fee payors. As a consequence, individuals, who are not entitled to overtime, enter not only comp time eligible weekend hours into the system, but all their other hours as well. By doing so, and obtaining approval of their time sheets, such individuals do not secure Local 503's approval to obtain overtime pay for any work they perform beyond a normal forty hour work week.

Thus, during her tenure, former President Best indicated that she reported to OIT regular forty hour work weeks for purposes of receiving her base pay from OIT, and recorded all the hours she worked (which frequently exceeded forty hours per week) in the SEIU Timekeeper system. President Best's entries into the SEIU Timekeeper system were reviewed by the Local

³ Like others in Local 503, former President Best logged many hours in excess of forty hours per week during her tenure in office. In fact, former President Best worked so many hours that she was unable to use much of the compensatory time she accrued under the Local 503 policy and lost several vacation days that she had accrued with the State, due to the fact that she was unable to take vacation as a result of work obligations.

503 Executive Director,⁴ who awarded her compensatory time for hours worked on the weekend that qualified for compensatory time under the PERU Contract. In line with the policies just described, former President Best only received compensatory time for the weekend work that qualified for compensatory time under the PERU Contract, she received no compensatory time or overtime for the many other hours she worked over a forty- hour week during her tenure as President even though those hours were logged, and approved, in the SEIU Timekeeper system and even though she would have been entitled to receive overtime for such work in her OIT position under the applicable collective bargaining agreement.

Both former Presidents Spence and Best found the compensation arrangement just described to be straightforward and easy to understand. Former President Spence stated that she "knew exactly" what type of compensation she would receive, given the clear guidance in the Local 503 Constitution and Bylaws on the subject. Former President Best explained that there was "no question in her mind" as to how the compensation arrangement would work. President Best also indicated that she is "almost sure" she discussed the compensation arrangement with President DiNicola when he was running for the post. President DiNicola, however, says that no such conversation occurred.

C. President DiNicola's Compensation

In accordance with the Local 503 Bylaws and Policies, and consistent with the past practice just described, throughout his first term in office and continuing through the present, President DiNicola has been compensated under the same three tier system. Specifically, President DiNicola has received: (I) the salary (without overtime), basic benefits (which, in President DiNicola's case, include pension, health, life and legal insurance), vacation and sick leave accruals, which he received as a Revenue employee, pursuant to a, collectively bargained lost time arrangement between Local 503 and the Department of Administrative Services ("DAS"); (ii) the \$400 monthly stipend authorized by the Local 503 Bylaws; and (iii), as authorized by the Local 503 policy, the same benefits extended to all excluded staff of Local 503 including expense reimbursements, mileage reimbursements, car allowances, the flexible medical benefit and compensatory time for certain weekend work that qualifies for such under the PERU Contract guidelines. Executive Director Frane said that she explained this compensation arrangement to President DiNicola when he started, specifically telling him that other than his base salary and benefits, his compensation would be governed by the Local 503 Bylaws and Policies. President DiNicola, however, says that he did not discuss these issues with Executive Director Frane or anyone else upon commencing his duties as President.

As had been the case with prior Presidents, the lost time arrangement under which President DiNicola worked was set forth in the relevant collective bargaining agreement, in this case between Local 503 and DAS (the "DAS Contract"), and implemented as to President DiNicola by way of a supplemental agreement between Local 503 and Revenue, his direct employer, titled "Agreement 1281." Specifically, the DAS Contract contains a lost time provision that is virtually identical to the lost time provision that applied to former President Best under the OUS Contract. The DAS Contract like the OUS Contract, provides that "the Union

⁴ As a matter of practice, the President and Executive Director review each others' SEIU Timekeeper time entries even though neither is technically the supervisor of the other.

President . . . shall, at his/her request, be given release time from his/her position for a period not to exceed the term of his/her office for the performance of Union duties directly related and central to the collective bargaining relationship," and obligates the Union to "reimburse the State for payment of appropriate salary, benefits, paid leave time, pension and all other Employer-related costs." Ex. E, DAS Contract, Art. 10, Sect. 13.⁵

Agreement 1281, which was drafted by Revenue, implements this basic arrangement. The agreement (which is attached as Exhibit F) is between Local 503 and Revenue and obligates Local 503 to fully reimburse Revenue for any and all compensation Revenue provides President DiNicola during his term of office. Accordingly, Agreement 1281 provides that the President is to "turn into Revenue each month a timesheet that records all time worked and appropriate leave taken signed by his Union Supervisor" and requires the Union "within 30 days of [Revenue's] payment to the President," to "reimburse Revenue for payment of salary, benefits, paid leave time, pension, and all other employer related costs," which the Agreement specifies include "[a]ll overtime, comp time earned and travel expenses." Ex. F.⁶

Consistent with the Local 503 Bylaws and Policies, and the past practice of the Union, when President DiNicola began his duties for the union he was instructed by Local 503 to report only a regular forty hour work week to Revenue so that he would not earn compensatory or overtime based on the work he performed for Local 503. President DiNicola says he followed this directive and turned into Revenue time sheets that only sought compensation for a regular forty hour work weeks.⁷ Revenue, in turn, paid President DiNicola for the time he reported he

⁵ In fact, the only relevant substantive difference between the two provisions is the addition of the word "appropriate" before salary in the DAS Contract, which arguably limits Local 503's reimbursement obligations under the DAS Contract only to those salary costs that are "appropriate." Ex. E, DAS Contract, Art. 10, Sect. 13.

⁶ Agreement 1281 also contains certain protections for the President, which specify that he "will retain all rights, benefits and privileges of his current position and classification," and "will be granted any/all salary adjustments for which he is eligible." *Id.* In addition, the Agreement contains a hold harmless provision under which the Union is obligated to "indemnify and the Union and President [to] hold Revenue harmless against any and all claims, damages, suits or other forms of liability which may arise out of any action taken or not taken by Revenue for the purpose of complying with this Agreement." *Id.*

Notably, Agreement 1281 as originally drafted included a provision that preserved "the agency's ability to evaluate the President's job performance and productivity." *See* Ex. G, Initial Draft of Agreement 1281. When President DiNicola brought the provision to Executive Director Frane's attention, she asked Revenue to delete the provision as it would be inappropriate for an employer to review the performance of Local 503's President. Revenue deleted the provision and President DiNicola has not been evaluated by Revenue during his tenure in office.

⁷ Notwithstanding the Agreement 1281 requirement that the time sheets submitted by President DiNicola be signed by "his Union Supervisor" the time sheets that President DiNicola submitted to Revenue did not contain the signature of any Local 503 official other than President DiNicola and were not provided by President DiNicola to Local 503. Because Local 503 had none of these timesheets, we requested copies of one or two of them from President DiNicola and his counsel but they did not provide those documents to us. Our conclusion that President DiNicola only requested that Revenue pay him for

had worked (or took as vacation, holiday or compensatory time) plus the additional benefits described above. Local 503 then reimbursed Revenue for the full costs it had incurred in making these payments and providing these benefits to the President.

Thus, for example, for December of 2006, President DiNicola reported to Revenue that he worked 112 hours on Local 503 matters, took 16 hours of vacation, 8 hours of holiday time and 32 hours of compensatory time (which he had already received as compensatory time off under the Local 503 policies) for a total of 168 hours of pay (or eight hours of time for every work day in December). See Ex. H, President DiNicola's Amended Revenue Timesheet for the Period ending 12/31/06 (showing original hours of compensation requested). Revenue paid President DiNicola for all 168 hours, and then sought reimbursement from Local 503 for the full cost of doing so as well as the cost of providing President DiNicola the benefits to which he was entitled. Ex. I, Revenue Reimbursement Request. The total amount paid by Local 503 to Revenue for these employment costs was \$7,348.47 or \$43.74 per hour. See Ex. J (Summary Chart of Local 503's Payments to, or on behalf of, President DiNicola).

In addition to receiving this compensation from Revenue, President DiNicola also received the two other types of compensation provided to him under the Local 503 Bylaws and Policies – namely, the \$400 monthly stipend and the benefits (expense reimbursements, mileage reimbursements, car allowance, compensatory time and flexible medical benefit) provided to excluded staff and the President as a matter of Local 503 policy. Thus, in December of 2006, President DiNicola received from Local 503, pursuant to Local 503's Policies, the week between Christmas and New Year's off as compensatory time,⁸ as well as a monthly car allowance of \$245, expense reimbursements of \$446.31 and the flexible medical benefit of \$140. See id. These benefits are all ones that were extended to President DiNicola only under Local 503's Policies, he was not entitled to receive them under the DAS Contract. Indeed, President DiNicola received the flexible medical benefit, which is intended to compensate excluded staff for health coverage that they choose not to receive from Local 503, notwithstanding the fact that President DiNicola does have such coverage under the DAS Contract.

President DiNicola also received, as he has throughout his tenure in office, a monthly salary supplement of \$257.37 from Local 503. That amount reflects a monthly supplement that the Board approved for President DiNicola in January 2005 (without President DiNicola's participation), when it discovered that Revenue would no longer pay him the salary supplement it previously had awarded to him for work on a special assignment. See Ex. L, Executive Session Minutes (dated Jan. 8, 2005). Revenue took the position that President DiNicola was no longer entitled to receive the salary supplement because he was no longer working on the special assignment due to his release to serve as Local 503 President. Id. So that President DiNicola would suffer no "economic loss" during his tenure in office, id., the Board approved paying

regular forty hour weeks is therefore not based on any review of the underlying timesheets, but on our review of the amended timesheets that President DiNicola submitted to Revenue in March of 2007, which uniformly report regular 40 hour work weeks plus the additional new overtime compensation that the President now seeks. In the future, to avoid any issues as to the propriety of the time sheets submitted by a Local 503 officer to a State employer, pursuant to a lost time arrangement, we strongly recommend that Local 503 approve and retain copies of all such time sheets.

⁸ See Ex. K, President DiNicola's SEIU Timekeeper Sheet for 12/24 -12/30/06.

President DiNicola the monthly salary supplement directly. Id. Although the monthly salary supplement was to be provided only until September of 2005, id., Local 503 continues to pay that monthly salary supplement to President DiNicola to this day. See Ex. J.

As his predecessor had done, President DiNicola logs his hours of actual work in the SEIU Timekeeper system for purposes of accruing compensatory time under the Local 503 Policies, and for purposes of collecting the necessary data on which Local 503 can make appropriate determinations as to the percentage of time that its staff and officers work on activities that are (or are not) properly chargeable to agency fee payors. As was the case for former President Best, President DiNicola's time entries for weekend and holiday work were reviewed by the Local 503 Executive Director for purposes of determining if that work was eligible for compensatory time. Because the SEIU Timekeeper system only submits for review as potential compensatory time those weekend or holiday hours that could qualify for compensatory time under the PERU Contract guidelines, Executive Director Frane only reviewed that subset of President DiNicola's hours for purposes of determining, and approving, his eligibility for compensatory time. Executive Director Frane neither reviewed, nor approved, any other hours reported by President DiNicola for purposes of determining, or approving, his receipt of additional compensation for the hours he reported.

On a number of occasions, Executive Director Frane raised questions with President DiNicola about whether his weekend and holiday work qualified for compensatory time under Local 503 Policies. For example, shortly after President DiNicola began his duties as President, he logged on his time sheet that he had walked a picketline on Christmas. When the system forwarded that time to Executive Director Frane for review for compensatory time purposes, she notified President DiNicola that she was not approving that time for compensatory time because it had not been a scheduled picket-line shift. Ex. M, Email of Executive Director Frane to President DiNicola (dated Jan. 6, 2005). President DiNicola wrote back that he had "no disagreement" with her conclusion that the time was not eligible for compensatory time, explaining that he did not "expect[] the Christmas picket to be on the clock." Id., Email of President DiNicola to Executive Director Frane (dated Jan. 7, 2005). But President DiNicola went on to explain that he would "continue to log *the non-compensated hours*" in the SEIU Timekeeper system. Id. (emphasis added).

The following year, Executive Director Frane and President DiNicola had a similar exchange over whether or not certain weekend work should count for compensatory time purposes. Specifically, Executive Director Frane did not approve for compensatory time a number of hours President DiNicola had worked over the weekend developing communications for the Hill campaign. See Ex. N, Email of Executive Director Frane to President DiNicola (dated Sept. 15, 2005). President DiNicola asked her to reconsider the issue, explaining that he

underst[ood] that catching up on emails, filing and general office work is not considered appropriate for comp time on weekends . . . but if I am required to work on internal communications over the weekend (e.g. the Hill campaign) – because we need to get a communication out on Monday and I'm not notified about it until Friday . . . I think it should count.

Id., Email of President DiNicola to Executive Director Frane (dated Sept, 16, 2006) (emphasis added). President DiNicola went on to note that the issue was "not a big deal since it's not likely

I'll use the comp time - - - but for future reference I'd like to understand the guidelines." Id.

In response, Executive Director Frane "approve[d] the comp time" in question and answered a question that President DiNicola had raised as to whether weekend work on phone banks and canvasses was eligible for comp time. Id. Email of Executive Director Frane to President DiNicola (dated Sept. 18, 2006). On the latter point, Executive Director Frane explained that phone bank and canvassing work was "eligible for comp time except for an exemption during the last two weeks before the election," which was "spelled out in the PERU contract." In response, President DiNicola thanked Executive Director Frane, saying that it was "helpful to know the guidelines" under which compensatory time was awarded.

These email exchanges, which both Executive Director Frane and President DiNicola explained were "representative" of others, were not the only communications between the two of them about the PERU Contract benefits that President DiNicola enjoyed as a matter of Local 503 policy. Approximately a year after President DiNicola took office, he submitted a large number of expenses for reimbursement. Some of the expenses he submitted for certain lunches were not reimbursable under the PERU Contract guidelines. When Executive Director Frane brought the matter to President DiNicola's attention, and gave him her copy of the PERU Contract so that he would be clear on the applicable guidelines, he promptly fixed the expense reimbursement requests in question by removing his requests for reimbursements that did not comply with the PERU Contract guidelines.

At no time prior to late February or early March of this year, did President DiNicola ever suggest to either the Board or Executive Director Frane that he believed he was not being properly compensated or that he should receive overtime or compensatory time from Revenue for the hours in excess of forty hours a week that he spent performing his duties as Local 503 President. Nor did President DiNicola raise the matter with Local 503's Finance Committee (whose meetings he frequently attended) or disclose his views on the matter on Local 503's LM-2, which he is responsible for signing and which, under the Local 503 Bylaws, must "accurately" disclose the Union's financial condition, see supra at 4, but which disclose no outstanding liability for unpaid overtime or compensatory time owed to President DiNicola. Rather, President DiNicola received his compensation from Local 503 without objection. Thus, by April of 2007, Local 503 had paid \$219,925.49 to, or on behalf of, President DiNicola or \$75,425.44 for his first year in office, \$83,562.43 for his second year in office and \$14,495.65 to date for his third year in office. See Ex. J. In addition, President DiNicola had used 103 hours of compensatory time that he had accrued under the Local 503 Policies.⁹ By that time, President DiNicola had also accrued over 201 additional sick days and 170.5 additional vacation days with Revenue based on the hours he had logged as Local 503 President. See Ex. P, Payroll Records for October 2004 and December 2006 (showing time accrued over that twenty-six month period).

D. The Dispute Over the Payment of Overtime or Compensatory Time to President DiNicola

⁹ As previously noted, supra at 6, at any time President DiNicola could log on to the SEIU Timekeeper system and determine exactly how many compensatory time hours he had earned under the Local 503 system, how many he had used, and how many he had lost. For a sample of what that report would look like see Ex. O, President DiNicola's Compensatory Time Record from SEIU Timekeeper.

In late February or early March of this year, however, President DiNicola approached Executive Director Frane and requested that she approve his submission to Revenue of a time sheet for February 2007, reporting 96 hours of overtime and requesting that Revenue provide him compensatory time for those hours. Executive Director Frane did not approve the time sheet, but indicated that she would submit the matter to the Board at its March 10, 2007 meeting.

At that meeting, the Board, in Executive Session with President DiNicola present, but not presiding, extensively considered President DiNicola's proposal that he should receive compensatory time for all the hours of overtime he had logged performing his duties as President. After hours of deliberations, the Board decided to seek the advice of outside counsel on the matter, with the understanding that the Board would revisit the issue at its April meeting once the outside counsel's report had been received.

Notwithstanding that result, following the meeting, President DiNicola submitted not only his February time sheet to Revenue, but amended time sheets covering the entire period that he has served as Local 503 President. The amended time sheets reported to Revenue the President DiNicola had worked 2,596 hours of overtime during his tenure as Local 503 President (an amount equivalent to \$113,549.04 at the hourly rate at which Local 503 most recently reimbursed Revenue for its payments to President DiNicola) or \$179,323.56 if President DiNicola were paid time and a half for those hours. President DiNicola does not dispute that the hours for which he sought overtime compensation from Revenue included hours that Executive Director Frane previously had determined were not eligible for compensatory time under the Local 503 Policies (compare Ex. M with Ex. Q). In a cover note to his submission to Revenue, President DiNicola asked to arrange "a time to discuss with you my right to elect cash or comp time for all overtime hours" reported. Ex. R. Letter of J. DiNicola to J. Lipscomb (dated March 19, 2007).

Because Local 503 is obligated under Agreement 1281 to reimburse Revenue for all payments it makes to President DiNicola for "salary, benefits, paid leave time, pension, and all other employer-related costs" including "[a]ll overtime, comp time earned and travel expenses," Local 503 promptly informed Revenue that it had not approved the overtime hours that President DiNicola had submitted and would not reimburse Revenue if Revenue paid President DiNicola for those hours unless and until Local 503 determined that such reimbursement was appropriate. Ex. S, Letter of M. Stefan to S. McLernan (dated March 19, 2007).¹⁰

ANALYSIS

There is no dispute that Local 503 is responsible for paying all of the employment costs associated with the compensation for the President of the Local during his/her time in office. Some of those costs are in the form of the Local's obligation – under the DAS Contract and

¹⁰ President DiNicola indicated to the Board at its March 10, 2007 meeting that he intended only to seek compensatory time for the hours of overtime he reported to Revenue but has indicated elsewhere an interest in preserving his right to cash out the time. See Ex. T, President DiNicola's Proposed Addendum to Agreement 1281 (which would allow him to cash out the compensatory time at any time). In any event, whether or not President DiNicola takes the time in question as compensatory time or as cash, the DAS Contract and Agreement 1281 require Local 503 to reimburse Revenue for the resulting cost. Neither President DiNicola nor Executive Director Frane disputes that fact.

Agreement 1281 – to reimburse the State for employment costs paid by the State in the first instance. The remainder of those costs are in the form of payments or benefits provided directly by the Local to the Local's President. Either way, federal law requires all such expenditures to be properly authorized by the Local in accordance with the Local's Constitution, Bylaws and policies. The question here is whether the \$113,549 that the Local would be required to expend to reimburse Revenue for providing retroactive overtime compensation to President DiNicola in the amount he has requested for both of his terms in office, either has been or could be properly authorized by the Local.

As a legal matter, the answer to what compensation President DiNicola may receive as Local 503's President must begin, and end, with Local 503's Constitution, Bylaws and Policies. That is so, as a matter of federal labor law, by virtue of section 501 of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 501(a), which recognizes that union officers and representatives "occupy positions of trust in relation" to their union and its membership, which obligate them:

"to hold [the union's] money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with [their] duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by [them] in whatever capacity in connection with transactions conducted by [them] or under [their] direction on behalf of the organization." [29 U.S.C. § 501(a) (emphasis added)].

By virtue of the fact that Local 503 has incorporated this section 501 language verbatim into its Bylaws, see Ex. A, Local 503 Bylaws, Article I, § 5(a), these requirements apply to the Board's actions not only by operation of federal law but by operation of the union's own governing documents. These section 501 obligations may be enforced by way of a civil action to enforce the Local 503 Bylaws, a civil action to enforce LMRDA section 501(a), or by way of a criminal prosecution under LMRDA section 501(c), 29 U.S.C. § 501(c).

The relevant questions that must be answered by the Board are thus whether Local 503 already has authorized President DiNicola to earn the overtime compensation in question and, if not, whether Local 503 may now retroactively authorize President DiNicola to earn that compensation. These questions arise, it bears emphasis, solely because Local 503 is ultimately responsible for reimbursing Revenue for any payments Revenue provides to President DiNicola including by way of reimbursing Revenue for any overtime or compensatory time it provides to President DiNicola, whenever that compensatory time might be taken. If Revenue were willing to provide the overtime or compensatory time sought without seeking reimbursement from Local 503, no section 501 issues would arise, as the transaction would involve no expenditure of union funds.

I. Neither the DAS Contract, Nor Agreement 1281, Can Be Read to Constitute Local 503's Authorization for President DiNicola to Accrue Overtime or Compensatory Time Under the State System

Neither the collectively bargained lost time provision in the DAS Contract, nor Agreement 1281, can reasonably be read to provide the necessary authorization by Local 503 for President DiNicola to accrue overtime or compensatory time with Revenue while he serves as Local 503's President. The two agreements, by their terms, are agreements between Local 503 and DAS/Revenue, not agreements between Local 503 and President DiNicola. Neither contains any language that expressly authorizes President DiNicola to earn overtime or compensatory time with Revenue for his work as Local 503 President. Nor can the agreements be read to confer such an authorization by implication in light of the clear language to the contrary in Local 503's Bylaws, see Ex. A, Local 503 Bylaws, Art. X, § 1(q), and Local 503's consistent past practice of providing – pursuant to Local 503's Bylaws and Policies – its full time Presidents only with compensatory time, not overtime, and of providing that compensatory time only for those weekend and holiday hours that qualify for such time under the PERU Contract guidelines.

The import of the lost time provision in the DAS Contract is twofold. First, the provision obligates the State to provide the Local 503 President or Executive Director with release time for the duration of his/her term of office to perform his/her Union Duties while remaining on the State payroll. See Ex. E, DAS Contract, Art. 10, § 13. Second, the provision obligates Local 503 to "reimburse the State for payment of appropriate salary, benefits, paid leave time, pension, and all other Employer-related costs" and "to hold the State harmless against any and all claims" arising out of the State's efforts to comply with its obligations under the lost-time provision. Id. The provision does no more than this and does not purport to confer on the Local 503 President or Executive Director the right to receive overtime under the State system during his/her term of office.

Agreement 1281 simply implements the basic deal struck in the DAS Contract as to the provision of release time. Recognizing that Article 10, Section 13 of the DAS Contract obligates the State to provide the Local 503 President with "release time from his position for a period not to exceed the term of his office," the Agreement specifies that Revenue will continue the President "in his permanent classification," granting him "any/all salary adjustments for which he is eligible" and continuing to provide him with all the "rights, benefits and privileges of his current current position and classification." Ex. F. Local 503, in turn, is obligated to "reimburse Revenue" within 30 days for any and all payments Revenue makes to the President for "salary, benefits, paid leave time, pension and all other employer-related costs" including "[a]ll overtime, comp time earned and travel expenses" and to "indemnify" and "hold Revenue harmless" for its implementation of the Agreement. Id. The import of this indemnification and hold harmless provision (which is also included in the DAS Contract, see Ex. E) is that Local 503, not Revenue, would effectively be the defendant to any action now brought to compel Revenue to pay overtime or provide compensatory time to President DiNicola.

President DiNicola's position is that the last sentence in bullet point five of Agreement 1281 grants him the right to earn overtime from the State as Local 503 President. In full, that sentence states as follows: "All overtime, comp time earned and travel expenses will be reimbursed by the Union to Revenue." Id. In combination with the Agreement's recognition that "[t]he President will retain all rights, benefits and privileges of his current position," President DiNicola maintains that these sentences not only preserve his right to earn overtime under the State system for his work as Local 503 President but expressly contemplate that he will receive overtime and comp time from the State during his tenure as Local 503 President.

In context, however, the sentence on which President DiNicola relies cannot reasonably be read to entitle him to overtime pay from the State. Rather, the sentence is simply a catch-all provision, written by Revenue to ensure that Revenue will be fully reimbursed for whatever costs it incurs under the lost-time arrangement, whatever those costs may be. Certainly, neither that sentence nor any of the others in Agreement 1281 can reasonably be read to confer on the President an authorization by Local 503 to receive overtime or compensatory time from the State for his work as President of the Local – for which, as discussed, the Local would be obligated to reimburse the State – over and above the compensatory time that the Local already provides, pursuant to its own policies, to persons who serve as President of Local 503.

As previously noted, the Local 503 Bylaws expressly provide that the President "shall serve on an *up to full-time basis* during the term of office." Ex. A, Local 503 Bylaws, Art. X, § 1(q) (emphasis added). The strong negative implication of that provision is that Presidents are not to serve on a more than a "full-time basis," nor are they to receive more than full-time compensation for their service. The conclusion that that reading of the Local 503 Bylaws is the appropriate one is confirmed by the consistent past practice of Local 503 of providing its Presidents with overtime, only compensatory time in line with the PERU Contract guidelines. It is well-established that such "[c]onsistent union past practices may be relied upon to establish the validity of an interpretation of a union constitution" or bylaws. Noble v. Sombretto, 2006 U.S. Dist. LEXIS 67354, **23-24 (D.C. Sept. 20, 2006) (citing Conley v. Parton, 1984 U.S. Dist. LEXIS 17006, 116 L.R.R.M. (BNA) 3071, 3075-76 (N.D. Ind. 1984) and Robinson v. Weir, 1967 U.S. Dist. LEXIS 7847, 65 LRRM 7847, 65 L.R.R.M. (BNA) 2956, 2957 (D. Neb. 1967) for the same proposition). Indeed, such consistent past practice is particularly powerful where, as here, even the party seeking a departure from past practice in the interpretation of the union's governing documents has conducted himself in line with the consistent past practice of the union on the point.

As we have explained, Local 503 has never provided overtime compensation to its Presidents. Instead, it has always provided its Presidents, including former President Best who had a lost time arrangement exactly analogous to the one in Agreement 1281, with compensatory time under the Local 503 system in accordance with the PERU Contract guidelines, not overtime or compensatory time under the State system. Thus, even though the lost time arrangement for former President Best provided that she was to "report *all work time* and use of paid leave on a monthly basis to [OIT]," which, in turn, was obligated to "continue to pay the President her salary, benefits, paid leave time, pension and *all other* regular employment-related costs," Ex. D, Letter of Agreement (dated Nov. 17, 2000) (emphasis added), neither Local 503 nor she ever interpreted the agreement as granting her the right to obtain overtime for her extensive hours of work in excess of a forty hour work week for which she was entitled to overtime under the OUS collective bargaining agreement. See supra at 5-6.

Likewise, as discussed, Agreement 1281 does not purport to create a right to overtime pay or compensatory time for work done on behalf of Local 503. That agreement simply recognizes that if Local 503 were to authorize President DiNicola to submit certain overtime hours for compensation by the State, the State would be entitled to full reimbursement of that employment cost by Local 503 – just as with all other employment costs of President DiNicola's service to Local 503 that are paid in the first instance by the State. Here again, the fact that President DiNicola proceeded during his entire first term and the first part of his second term on the assumption that his right to compensatory time was governed by the PERU Contract guidelines,

confirms that he did not, at least until the recent assertion of his present claim, understand that Agreement 1281 conferred on him any right to compensatory time beyond Local 503 's consistent past practice. Thus, President DiNicola has earned a number of hours of compensatory time pursuant to the PERU Contract guidelines during his tenure in office and has used 103 of those hours. See Ex. 0. The fact that (i) President DiNicola not only earned and used those compensatory time hours under the Local 503 system, but had several exchanges with Executive Director Frane over whether certain hours he worked should count for purposes of accruing compensatory time under the Local 503 system, see supra at 10-11, and (ii) could, at any time, pull up a screen on the SEIU Timekeeper system that informed him exactly how much compensatory time he had accrued under the Local 503 system, cannot be reconciled with any notion that he considered his situation to be different in any meaningful respect from that of the prior Local 503 Presidents. The consistent past practice of Local 503 on this point, including its treatment of President DiNicola, leaves little room for my claim that he, unlike every other local 503 President, has been authorized to receive overtime or compensatory time from the State during his/her tenure in office.

Moreover, to interpret the DAS Contract and/or Agreement 1281 to create a right in President DiNicola to receive overtime pay or compensatory time over and above what Local 503 authorizes under its own policies would be to render those agreements untenable as a matter of Oregon statutory labor law. It is a fundamental tenet of labor law in general, and Oregon labor law in particular, that an employer – here the Department of Revenue – may not interfere in any respect with, inter alia, the administration of a labor organization – here Local 503. See Or. Rev. Stat. §243.672(b) (2006). In this respect, Oregon law provides that a public employer may not "[d]ominate, interfere with or assist in the formation, existence or administration of any employee organization." Id.

Precisely because of the impropriety of such interference, the provision in the original draft of Agreement 1281 that Revenue would have the right to "evaluate and review" the performance of President DiNicola was removed from the agreement. Similarly, in line with that same statutory provision, Revenue cannot be in the position of determining whether or not to authorize overtime pay or compensatory time for a union officer. Such a role would, at best, put Revenue in the position of judging what overtime work on behalf of Local 503 is appropriate for the President of Local 503 to perform; at worst, it would make the President of Local 503 beholden to an employer with whom the Local deals for determinations affecting the amount of his individual compensation as a union officer. To give an employer that kind of power over a union officer's compensation would constitute the most dangerous form of "interfere[ence] with . . . the . . . administration of an [] employee organization." Indeed, for private sector employers, such an arrangement would constitute a federal crime for both the employer and the union official. See 29 U.S.C. § 186. Here the arrangement would constitute double interference with the affairs of the Local: first, Revenue would determine which overtime hours of the Local's President are worthy of compensation; and, second, Revenue would impose the costs of that determination on the Local through the reimbursement process.

If it is illegal under Oregon law for the State employer to be authorizing overtime pay or compensatory time for President DiNicola, then the judgment of what overtime pay or compensatory time is authorized for President DiNicola could only be made by Local 503 or by President DiNicola himself. We have already seen that Local 503 has authorized only certain weekend or holiday hours for compensatory time. That compensatory time is specifically

approved by the Executive Director and is provided directly by Local 503, not indirectly through reimbursement by the State. And, as we show in the next section of this memorandum, it would be a violation of federal law, 29 U.S.C. § 501, for President DiNicola to be authorizing overtime pay or compensatory time for himself.

Accordingly, the interpretation of the DAS Contract and Agreement 1281 to create a right for President DiNicola to receive overtime or compensatory time from Revenue, over and above the compensatory time authorized by the Local, would render these agreements violative of Oregon's statutory labor law. It is a cardinal principle of contract interpretation that where the language of a contract can reasonably be read to avoid an illegal interpretation, the contract should be so read. Walsh v. Schlecht, 429 U.S. 401, 408 (1977). The parties to the contract are presumed to know the law applicable to the terms of the contract and to intend to enter into an enforceable agreement. Id. Hence, the interpretation of those agreements that would grant Revenue such authority to interfere with Local 503, necessarily fails.

In any event, as we have already shown, the only reasonable reading of the DAS Contract and Agreement 1281 is that those agreements do not confer on President DiNicola any right to overtime pay or compensatory time that is not authorized by Local 503. Those agreements do no more than protect the right of Revenue to reimbursement from Local 503 in the event that the Local should authorize President DiNicola to submit overtime hours to Revenue for the purpose of obtaining overtime pay or compensatory time. In the absence of any such authorization, those agreements do not create an independent right in President DiNicola to have Revenue pay him overtime or compensatory time – for which the Local must reimburse Revenue – for services on behalf of the Local performed by President DiNicola.

II. The Board May Not Retroactively Authorize President DiNicola to Receive the Overtime Compensation at Issue

Given that the Board has not previously authorized the compensation that President DiNicola is now requesting, the question becomes whether the Board may now, retroactively, authorize the overtime compensation that President DiNicola is seeking. It bears emphasis that the Board is the relevant decisionmaker on this point, not the Executive Director or the President as neither has the authority under the Local 503 Constitution or Bylaws to obligate Local 503 to make an expenditure in the amount (approximately \$113,549, see supra at 12) at issue here.¹¹ See also supra at 4. Indeed, the President has no authority to expend Local 503 monies, rendering his decision to submit time sheets to Revenue seeking compensation for 2,596 hours of overtime, without the Board's approval, a "classic breach" of his section 501 duties. See e.g., Guzman v. Bevona, 90 F.3d 641, 647, (2d Cir. 1996) ("Expenditures by union officers that violate the union's constitution represent the classic case of breach of fiduciary duty under section 501.").

Although union officers generally have broad latitude under section 501 to conduct the

¹¹ As detailed infra at 10-21, even if President DiNicola were authorized to receive overtime under the State system, he would not be eligible to receive time and a half for that work, as his current duties exempt him from the reach of the federal and state wage and hour laws. Accordingly, the relevant number to the Board's current analysis is \$113,549, not the \$179,324 that Local 503 would incur if President DiNicola were paid time and a half on the hours at issue.

affairs of their union as they see fit, at a minimum, section 501 requires that officers conduct their union's affairs in the manner set forth in their union's governing documents and policies, id., or, to put the point in section 501's terms, "in accordance with [the union's] constitution and bylaws and any resolutions of the governing bodies adopted thereunder . . ." 29 U.S.C. § 501(a). Because the Local 503 Bylaws provide that the President "shall serve on an up to full time basis during the term of office," see Ex. A, Local 503 Bylaws, Art. X, § 1(q), and because Local 503 has had a consistent policy of not providing overtime to its President, the Board cannot authorize the transaction in question unless it both modifies the Local 503 Bylaw on this point and modifies its policies to permit the payment of overtime compensation to its President.

Moreover, even if the Board could properly take those actions now, modifying its Bylaws and policies to authorize the transaction at issue, its actions would still be subject to scrutiny under section 501. Particularly where, as here, a Board action personally benefits a fellow officer, courts will look closely at the transaction in question to determine whether, under all the relevant circumstances, it is so "manifestly unreasonable" as to amount to a fiduciary breach. See, e.g., Morrissey v. Curran, 650 F.2d 1267, 1274, (2d Cir. 1981); Talbot v. Robert Mathews Distributing Co., 961 F.2d 654, 666 (7th Cir. 1992); Council 49 AFSCME v. Reach, 843 F.2d 1343, 1347, (11th Cir. 1988); Ray v. Young, 753 F.2d 386, 389 (5th Cir. 1985); Brink v. DaLesio, 667 F.2d 420, 425 (4th Cir. 1981). In conducting this analysis, courts evaluate whether or not the transaction at issue serves any legitimate union interest or whether it only confers a personal benefit and therefore could only have been approved by officers acting in violation of their section 501 fiduciary obligations. See, e.g., United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977) (union officers violated section 501(c), the criminal prohibition, by authorizing lavish union convention that served no legitimate union purpose).

Given the amount of overtime compensation in question – approximately \$113,549 or well over a year's worth of salary – the proposed expenditure is "manifestly unreasonable" under all the relevant circumstances. For his first twenty-eight months in office, President DiNicola evidently proceeded on the assumption that he was not entitled to recover overtime from the State but could only recover compensatory time from Local 503 consistent with the PERU contract guidelines. Accordingly, the retroactive payment that President DiNicola is now requesting could serve no legitimate union purpose as it would not be necessary to secure his services as President to date. Rather, the proposed payment would simply provide the President with a substantial windfall that was contemplated by no one, not even him, when President DiNicola took office and performed his duties throughout the course of his first, and the beginning of his second term. The unreasonable nature of the proposed transaction is only heightened by its timing, coming on the heels of President DiNicola's election to his final term of office, an election in which there was no disclosure to anyone of President DiNicola's view that he is entitled to 2,596 hours of overtime, or approximately \$113,549, for his work as Local 503 President to date.¹²

Moreover, even if the proposed transaction could somehow be found to be a reasonable one, which serves a legitimate union purpose, the transaction would run foul of section 501's prohibition against self-dealing by a union officer. One of the most basic prohibitions of section 501 is that an officer cannot stand on both sides of a transaction with a union, representing not

¹² As previously noted, Local 503's LM-2 Reports, which are signed by President DiNicola, do not disclose any such outstanding liability to either Revenue or to President DiNicola.

only the union but his own interests that are adverse to the union. See 29 U.S.C. § 501(a) (officer must “refrain from dealing with [his union] as an adverse party”); Hoffman v. Kramer, 362 F.3d 308, 313 (5th Cir. 2004) (section 501 prohibits an officer from “self-dealing . . . or act[ing] adversely to union interests”); Anderson v. Vestal, 1971 U.S. Dist. LEXIS 11608,79 LRRM 2725 (M.D. Tenn. Sept. 20, 1971) (union officer violated section 501(a) by transacting personal business with the union at less than fair market value). At the most fundamental level, it would violate Section 501 for a union officer to determine his own compensation from the union. It is clear in this case that no one, other than President DiNicola, reviewed for compensation purposes the hours for which he now seeks overtime compensation. Executive Director Frane only reviewed certain of the hours President DiNicola worked (those that were potentially eligible for compensatory time under the Local 503 policies) and only reviewed that limited subset of those hours for purposes of determining whether or not President DiNicola was eligible to receive compensatory time under the Local 503 Policies for those hours. Indeed, in his recent submission to Revenue, President DiNicola paid absolutely no heed to the determinations on this point that Executive Director Frane made under the Local 503 Policies. Thus, President DiNicola submitted hours that he knew that the Executive Director had determined not to be eligible for compensatory time under Local 503's policies (see *supra* at 12); and, he submitted 103 hours for which he had already used compensatory time under the Local's Policies. Because no one reviewed the other hours for which President DiNicola now seeks overtime compensation, if the Board were to approve President DiNicola's retroactive receipt of overtime for those hours, it would effectively be permitting President DiNicola to authorize his own overtime compensation and therefore to set a very significant portion of his own compensation for his first twenty-eight months in office. Such a result would violate section 501's prohibition against self-dealing by a union officer.¹³

The section 501 difficulties with the transaction that President DiNicola has proposed are only compounded by the fact that, as just mentioned, the amended Revenue sheets he has submitted to Revenue seek to recover overtime for hours that Executive Director Frane previously determined were eligible for compensatory time. See supra at 12. In other words, if the Board were to authorize President DiNicola to receive the overtime he has requested from Revenue it would be retroactively authorizing him to recover compensatory time on hours for which Local 503, under the Local's established policies, previously determined no compensatory time was owed. The Board would also be retroactively authorizing President DiNicola to recover 103 hours of compensatory time from Revenue even though Local 503 previously provided him with compensatory time for those very same hours. In both these respects as well, the overtime transaction before the Board cannot be squared with section 501's fiduciary requirements.

III. Local 503's Timekeeping Practices Do Not Raise Any Issue Under the Applicable Federal or State Wage Laws

What we have said thus far disposes of the contention that President DiNicola was

¹³ In our discussions with President DiNicola, he posited that his overtime hours in fact had been approved by Local 503 by virtue of their entry into the SEIU Timekeeper system, and that those hours could be reviewed by his supervisor at Revenue as well. We already have explained in text why Revenue could not review President DiNicola's hours of work and have shown as well that Executive Director Frane's review of certain of the hours that President DiNicola worked did not constitute approval for compensation purposes of all the hours that President DiNicola submitted into the SEIU Timekeeper system.

authorized to receive overtime under the Local 503 Constitution, Bylaws or Policies and thereby disposes of the contention that President DiNicola is entitled to receive the overtime requested. A related question, however, has been raised by President DiNicola as to whether or not Local 503's timekeeping systems comply with federal and state wage and hour laws insofar as they result in him submitting time sheets to Revenue for regular 40 hour work weeks, and at the same time submitting time sheets to Local 503 that show not only those hours but the hours that the President worked in excess of 40 hours per week.

As previously explained, the timesheets that President DiNicola submits to Revenue and the hours that he logs on to the SEIU Timekeeper system serve two different purposes. The Revenue timesheets trigger Revenue's obligation to pay President DiNicola under the lost-time provision set forth in the DAS Contract, as implemented as to President DiNicola by Agreement 1281. For all the reasons we have just described, President DiNicola may not log on the Revenue timesheet hours he has worked in excess of a regular forty hour work week because if he did so he would receive unauthorized, and hence, illegal, overtime compensation from Local 503. In contrast, the hours President DiNicola logs on the SEIU Timekeeper system, allow Local 503 to make determinations as to the proportion of his time that is properly chargeable (or not) to agency fee payors and permits Local 503 Executive Director Frane to determine whether or not President DiNicola is entitled to receive compensatory time, under the Local 503 Policies, for certain weekend and Holiday hours. We are aware of no provision under the federal or state wage and hour laws, which prevents Local 503 from using different timekeeping mechanisms that are appropriately tailored to the very different purposes they serve.

Moreover, the premise of President DiNicola's questions on this point appear to be that he is protected by the provisions of the federal and state wage and hour laws in his capacity as the President of Local 503. That premise is incorrect. While President DiNicola is serving as President of Local 503 he is exempt from the protections of those laws. Section 13(a) of the federal wage and hours law exempts from that law employees who are employed in a bona fide administrative capacity, see 29 U.S.C. § 213(a)(1); Auer v. Robbins, 519 U.S. 452, 454 (1997), and the Oregon wage and hour law contains a similar exemption. See Or. Rev. Stat. § 653.020. To be exempt from the federal law, an employee must "earn a specified minimum amount on a 'salary basis'" (currently not less than \$455 per week) and perform duties of an administrative nature, Auer, 519 U.S. at 455, meaning work that is directly related to management policies or general business operations and that requires the employee to exercise independent judgment and discretion. 29 C.F.R. § 541.200(a)(2-3).¹⁴ The test is similar under the Oregon law, requiring evidence that the administrative employee performs "predominately intellectual, managerial or creative tasks" and exercises "discretion and independent judgment." See Or. Rev. Stat. § 653.020.

Applying the federal test to a situation just like this one, the Sixth Circuit Court of Appeals held that a union official is exempt from the federal wage and hour protections when he is performing his union duties. See Douglas v. Argo-Tech, 113 F.3d 67 (6th Cir. 1997). In that case, a union vice president, who was released full time from his regular duties pursuant to a

¹⁴ Significantly, the governing federal regulations define such administrative employees to include team leaders for major projects even if those leaders do not have direct supervisory authority over other team members. See 29 C.F.R. § 541.203(c).

collectively bargaining lost time arrangement, sued his employer, contending that his employer should pay him overtime for all the hours he worked in excess of a regular forty hour work week performing his union duties. The court rejected the claim, concluding that the official was exempt from the protections of the federal wage and hour laws as a bona fide administrative employee. Not only was the official effectively a salaried employee because he was guaranteed to receive pay for at least 40 hours per week regardless of how many hours he actually worked, but he performed duties, enforcing the collective bargaining agreement, that were "directly related to management policies" without any oversight by his employer. Id. at 72-73. The exact same conclusions follow as to President DiNicola, who also, as a matter of Local 503 Bylaws and Policies, is guaranteed a forty hour per week salary, and who also performs duties that are "directly related to management policies" exercising substantial independence and discretion. Those conclusions dispose of any notion that President DiNicola may invoke the protections of the federal and state wage and hour laws in his capacity as Local 503 President.

CONCLUSION

We believe that the foregoing fully answers the questions you have raised. Should you have any further questions, please do not hesitate to contact us.

Exhibit A