

**DISRTICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS**

Dorothy A. Brizill,
Complainant,

v.

D.C. Office of
Campaign Finance
Respondent.

Administrative Hearing

No. 00-036 B

Re: Appeal of OCF rejection
of complaint

MEMORANDUM OPINION AND ORDER

I. **BACKGROUND**

A. **Statement of Proceedings**

This appeal arises out of an Office of Campaign Finance (OCF) complaint filed by Ms. Dorothy Brizill on June 19, 2000. Ms. Brizill alleges a violation of a recent OCF Order in the matter of *Brizill v. Mayor Anthony Williams et al.* MUR 00-01. The order involves the School Governance Charter Referendum and the mayor's support thereof—using government resources to effect the outcome of the measure. Specifically, Ms. Brizill claims the OCF order is currently being violated by activities set in motion by the mayor's office prior to the issuance of the order on June 16, 2000.

On June 19, 2000, Ms. Brizill filed a complaint by letter alleging Mayor Williams' failure to withdraw a correspondence coordinated by his Office of Religious Affairs. The letter written by the Director, Rev. Donald A. Robinson, requested local ministers to circulate and discuss flyers in support of the School Governance Charter Amendment Act of 2000. Additionally, the letters directed any questions, concerns and requests for additional information to the Mayor's Religious Affairs Office.

OCF responded on June 20, 2000 and rejected Ms. Brizill's complaint because she failed to include a clear and concise statement of the alleged acts that constitute a violation of the OCF Order of June 16, 2000. OCF was assured by the Mayor's Office that District Government resources had not been used since the issuance of the Order, and that District Government resources would not be used to influence the outcome of the June 27, 2000 special election on the Charter Amendment.

Due to the exigency of circumstances of the election being held a mere week after OCF's determination to reject Ms. Brizill's complaint, the Board decided to forego the customary pre-hearing conference and scheduled a hearing before the Board on June 21,

2000 to hear the matter. The Board informed the Mayor's Office and Ms. Brizill of the hearing date and convened to hear the merits of the case.

B. Statement of the Facts

This matter deserves some preface by reference to the initial June 16, 2000 OCF Order. The matter arose out of an initial complaint by Ms. Dorothy Brizill against Mayor Anthony A. Williams. Ms. Brizill alleged violations of the District of Columbia Personnel Regulations, Chapter 18, "Employee Conduct." Specifically, Ms. Brizill claimed Mayor Williams used District government employees during normal work hours and District government facilities and supplies in support of the "School Governance Charter Amendment Act of 2000." The Mayor's June 12, 2000 press conference in which he publicly announced that he intended to use District of Columbia government resources to campaign for the Charter Amendment precipitated Ms. Brizill's complaint and triggered the OCF investigation into the matter.

OCF's investigation focused on whether Mayor Williams' actions violated §§ 1803.1, 1804.1(b), and 1806.1 of the Standards of Conduct.

§1803.1 reads, "An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in, or create the appearance of...(f) [a]ffecting adversely the confidence of the public in the integrity of government."

§1804.1 reads, "An employee may not engage in any outside employment or other activity which is not compatible with the full and proper discharge of his or her duties and responsibilities as a government employee. Activities or actions which are not compatible with government employment include, but are not limited to the following...(b) Using government time or resources for other than official business, or government approved or sponsored activities."

§1806.1 reads, "A District employee shall not use or permit the use of government property, equipment, material of any kind, including that acquired through lease, for other than officially approved purposes."

Having reviewed the allegations and the parties' responses thereto, OCF found that Mayor Williams did in fact use government employees and supplies in preparation for and during his June 8th press conference. The Mayor was acting in reliance upon advice solicited from the Corporation Counsel, and consequently acted appropriately. Notwithstanding the propriety of his actions, OCF found that Mayor Williams—at a minimum—created the appearance of "affecting adversely the confidence of the public in the integrity of government" and violated the aforementioned Standards of Conduct. OCF accordingly ordered Mayor Williams to terminate all action involving the use of resources of the District of Columbia Government to influence the outcome of the June 27, 2000 election on the matter of the Charter Amendment.

Presently, Ms. Brizill claims that the writing and delivery of the letter to the local churches merely encompasses a small part of an ongoing activity. Ms. Brizill contends that the cease and desist order requires an affirmative duty to make all efforts to ensure compliance by withdrawing all the letters sent.

II. ANALYSIS

A. Standing

In order to have standing to bring a particular suit, a plaintiff must have suffered a legal wrong or been adversely affected or aggrieved by the agency action he objects to, D.C. CODE §1-1510, *Diamond v. District of Columbia*, 797 F.2d 179 (D.C. Cir.); *and* must show there is a causal connection between that concrete injury and the agency action complained of, *National Wildlife Federation v. Babbitt* 835 F.Supp. 654; *and* the injury must "likely" to be "redressed by a favorable decision." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61.

In the instant case, Ms. Brizill alleged no specific incident of violation on behalf of the Mayor. Although her claim of violation is indeed quite serious, if she can cite no new violations since the OCF rendered its order, then her complaint is insufficient because it does not rise to the level of a traceable subjective harm.

Ms. Brizill's complaint filed with the OCF alleged no invasion of a legally protected interest. Similar to *Common Cause*, Ms. Brizill seeks only prosecution. While "Congress can create a legal right ... the interference with which will create an Article III injury," *id.* at 736, Congress cannot, consistent with Article III, create standing by conferring "upon all persons ... an abstract, self-contained, non-instrumental 'right' to have the Executive observe the procedures required by law," *Lujan*, 504 U.S. at 573.

Board may not disturb an OCF decision to dismiss a complaint unless the dismissal was based on an "impermissible interpretation of the Act...or was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). This is not a contested case because Ms. Brizill asserts no deprivation of rights and there is no justiciable case or controversy; consequently, the case can be dismissed for a lack of standing. However, the Board—being the ethics agency charged with the responsibility of enforcing the code for Employee Conduct with respect to D.C. government officials—thought it prudent to explore the decision process sua sponte.

B. OCF Interpretation

Ms. Brizill understands the OCF order to require the Mayor to utilize more government resources to effect a recall of all the letters sent to the local churches. However, during the hearing, OCF states that its Order required nothing of the sort; rather, the Mayor was ordered to cease and desist from all prospective activity. What appears to be a difference of interpretation is alleviated with the basic principles of administrative law: defer to OCF's expertise, and give substantial weight to the its interpretation of the regulation.

When OCF applies and interprets its own Order, the Board must defer and may not substitute our own interpretation unless the agency's construction is clearly erroneous. 449 A.2d 301 at 306 (citing Goto v. District of Columbia Bd. of Zoning Adjustment, 423 A.2d 917, 924 (D.C. 1980); Capitol Hill Restoration Society v. Zoning Comm'n, 380 A.2d 174, 181-82 (D.C. 1977)).

This Board, notwithstanding that it might have chosen or reached a different result, does not have the discretion to substitute its judgment for OCF's unless convinced that OCF's action was plainly wrong, or without support by substantial evidence in the administrative record. See Schiffman v. District of Columbia Alcoholic Beverage Control Bd., 302 A.2d 235 (D.C. 1973); Muir v. District of Columbia Alcoholic Beverage Control Bd., 450 A.2d 412 (D.C. 1982). In light of the circumstances surrounding the Mayor's violations—namely being advised that the proposed action was proper by Corporation Counsel—the OCF interpretation to cease and desist prospectively is a reasonable one.

C. Mayor's Reasonable Efforts at Compliance

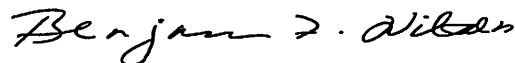
Although the OCF interpretation requires a prospective *cease and desist* the appearance of "affecting adversely the confidence of the public in the integrity of government" requires at a minimum that the Mayor use his best efforts to ensure compliance with the OCF Order. The Mayor's actions taken prior to the cease and desist can reasonably be seen as adversely affecting the outcome of the election. Such a use of government resources tends to eviscerate public confidence in the impartiality of the Charter Amendment Process. That being said, the Mayor should use his best efforts at alleviating the public perception of the use of government resources in a partial manner to effect the outcome of the Charter Amendment Process.

Accordingly, it is this 26th day of June, 2000,

ORDERED, that Claimant's appeal of the Office of Campaign Finance decision to reject her complaint for lack of alleged a specific instance of violation of its June 16th 2000 Order be affirmed. It is

FURTHER ORDERED the Mayor use his best efforts at ensuring compliance with the June 16 2000 Order and remedy the effects of past violations.

June 26th 2000



Benjamin F. Wilson, Chairman
D.C. Board of Elections & Ethics.