

**DISTRICT OF COLUMBIA  
BOARD OF ELECTIONS AND ETHICS**

In Re:	)	
	)	Rulemaking Hearing
Petition to Amend 3 D.C.M.R	)	No. 10-008
§§ 500.10, 510.2, 513.2, 517.2, and	)	
9900.1	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**I. INTRODUCTION**

This matter came before the District of Columbia Board of Elections and Ethics (hereinafter “the Board”) during a special hearing on August 25, 2010 pursuant to the submission of a petition to amend 3 D.C.M.R. §§ 500.10, 510.2, 513.2, 517.2, and 9900.1 (“the Petition”).<sup>1</sup> These provisions (“the Rulemaking”) specify that registered voters shall not change their party affiliation status during the 30-day period that immediately precedes and includes the date of a primary election (“30-day period”). The Rulemaking further provides that

[a] change in party affiliation status occurs when a voter:

- (i) Changes his or her party registration from one political party to another;
- (ii) Changes his or her party registration from “No Party (Independent)” to a political party;
- (iii) Changes his or her party registration from a political party to “No Party (Independent).”

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<sup>1</sup> The petition was styled as a “request to reconsider” the regulations at issue. However, pursuant to D.C. Official Code § 2-505(b), which permits “[a]ny interested person [to] petition ... an independent agency requesting the promulgation, amendment, or repeal of any rule”, the Board shall treat the request as a petition for amendment of the regulations.

The Petition was submitted by Fenty 2010 through its counsel, Marc E. Elias, Esq., Partner, Perkins Coie LLP. Fenty 2010 was represented at the hearing by Mr. Elias. Chairman Togo D. West, Jr. and Board member Charles R. Lowery, Jr. presided over the hearing.

## II. BACKGROUND

On February 4, 2010, the Omnibus Election Reform Act of 2009 (“the OERA”) became law in the District of Columbia. Pursuant to the OERA, the District’s election statute was amended to provide, *inter alia*, that “[a] qualified elector shall not change his or her party affiliation after the 30<sup>th</sup> day preceding an election.”<sup>2</sup> The OERA also established that “[a] qualified elector shall not change his or her party affiliation on Election Day.”<sup>3</sup>

During the Council’s Committee on Government Operations and the Environment’s (“the Committee”) markup of the OERA’s originating bill on September 25, 2009, Councilmember David A. Catania moved two amendments related to party affiliation. First, Councilmember Catania moved an amendment that would have allowed voters to change their party affiliation during the 30-day period. Second, Councilmember Catania offered an amendment that would have allowed individuals to vote in a primary election held by any political party that adopted a rule permitting unaffiliated voters to vote in its primary. Each of these amendments was defeated after Committee debate by votes of 3-1.<sup>4</sup>

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<sup>2</sup> D.C. Official Code § 1-1001.07(g)(4).

<sup>3</sup> D.C. Official Code § 1-1001.07(g)(5).

<sup>4</sup> See Report of the Committee on Government Operations and the Environment on Bill 18-345, the Omnibus Election Reform Act of 2009 at 23 (Council of the District of Columbia, September 25, 2009).

On August 12, 2010, the Board adopted the Rulemaking pursuant to the OERA. On August 23, 2010, Fenty 2010 filed the Petition.

### III. ANALYSIS

The basis for the Petition is that the Rulemaking, as currently constituted, “reverses the long-standing practice allowing [unaffiliated] voters to participate in D.C. partisan primaries[.]”<sup>5</sup> Fenty 2010 also asserts that nothing in the District’s election statute prohibits unaffiliated voters from registering with a party during the 30-day period.

#### A. Unaffiliated Voters’ Ability to Participate in Primary Elections.

Contrary to Fenty 2010’s understanding of our past practice, the Board has never counted ballots cast by individuals who attempted to vote in primary elections held by parties to which they do not belong. This is because the District of Columbia has a closed primary system.<sup>6</sup> Accordingly, only registered members of a party may vote in that party’s primary.

However, through its special, or provisional, ballot program, the Board issues ballots to *all* individuals who appear to vote, even if their eligibility to vote in a particular election is in question. This policy ensures that no properly registered voter is denied their right to cast a ballot due to an error of some sort in their voter registration status. Consequently, the Board allows individuals who have not declared a party to cast

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<sup>5</sup> The Petition (August 20, 2010) at 1.

<sup>6</sup> See D.C. Official Code § 1-1001.09(g)(1) (“No person shall ... vote in a primary or party election held by a political party other than that to which he or she has declared himself or herself to be a member.”). See also D.C. Official Code § 1-1001.14(a) (“Any person who shall ... attempt to vote in an election held by a political party other than that to which he or she has declared himself or herself to be affiliated ... shall, upon conviction, be fined not more than \$10,000 or be imprisoned not more than 5 years, or both.”).

provisional ballots in primary elections. Moreover, the Board records that such voters have “participated” in the primary election in which they have cast provisional ballots. But this does *not* mean that these provisional ballots are counted. In fact, the Board has consistently rejected such ballots.<sup>7</sup> Accordingly, the argument proffered by Fenty 2010 that the Board, through its Rulemaking, has “deprive[d] voters of their right to participate in an election” is without merit.<sup>8</sup> No right available to voters prior to the Rulemaking has been denied them as a result of the Rulemaking.

**B. Unaffiliated Voters’ Ability to Change their Political Party Affiliation During the 30-day Period.**

Having established that unaffiliated voters may not participate in partisan primary elections in the District, the only question remaining is whether the OERA was intended to prohibit such voters from affiliating with a political party during the 30-day period. We conclude that it was.

Prior to the enactment of the OERA, the voter registry was closed during the 30-day period. Accordingly, the Board could not process voter registration applications or registration update notifications (changes in name, address, and/or party affiliation) during the 30-day period except those that were received postmarked by not later than the 30th day preceding an election, and those that were non-postmarked, but timely

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<sup>7</sup> See e.g., “Special Ballot Acceptance and Rejection Codes” Sheet, “February Primary 2008 Party Rejects” Report, and “September Primary 2008 Special Ballots” Report (indicating that Code 3 is indicated for special ballots rejected because the voter failed to vote in party as registered, and listing all voters whose special ballots were rejected on that basis during the February 12, 2008 Presidential Preference Primary Election, and the September 9, 2008 Congressional and Council Primary Election). See also Letter from Darlene Lesesne Horton, Board Data Systems Manager, to registered voters whose special ballots were rejected because they were not “registered to vote in one of the parties qualified to conduct a primary.”)

<sup>8</sup> The Petition at 3.

completed, mailed, and received not later than the 23rd day preceding an election. As a result of the OERA, individuals may now either register or update their names and addresses in the voter registry during the 30-day period.

As noted above, the Committee had occasion to consider an amendment that would have stricken the OERA provisions that preclude voters from changing their party affiliation during the 30-day period. In the absence of these provisions, it is clear that registered voters would be able to update their party affiliation status during the 30-day period in the same manner that they are able to update their names and addresses. This means that voters who so desired would have been able to switch from one political party to another, become No Party (Independent) voters, or affiliate with a political party during the 30-day period. Put differently, the Committee knew precisely the language that it needed to employ to permit the result Fenty 2010 seeks. The Committee declined.

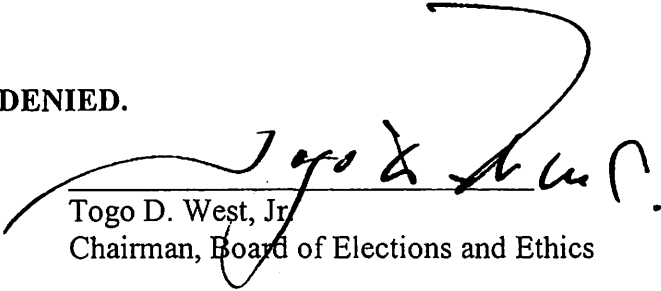
#### IV. CONCLUSION

Based on our review of the legislative history of OERA, the Board concludes that this legislation does, in fact, preclude unaffiliated voters from declaring a party during the 30-day period. Thus, the Rulemaking reflects a valid and accurate interpretation of the OERA.

Accordingly, it is hereby,

**ORDERED** that the Petition is **DENIED**.

August 25, 2010  
Date

  
Togo D. West, Jr.  
Chairman, Board of Elections and Ethics

Charles R. Lowery, Jr.  
Member, Board of Elections and Ethics